United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF AND APPENDIX FOR APPELLANTS.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

NO. 8247

THE WASHINGTON LOAN AND TRUST COMPANY, A CORPORATION, Appellant,

v.

UNITED STATES OF AMERICA, Appellee,

NO. 8248

THE RIGGS NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION, Appellant,

v.

UNITED STATES OF AMERICA, Appellee,

and

NO. 8249

THE COLUMBIA NATIONAL BANK OF WASHINGTON, A CORPORATION, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

899

Appeals from the District Court of the United States for the District of Columbia.

ARTHUR PETER,
Washington Loan & Trust Building,
GEORGE P. HOOVER,
Investment Building,
Washington, D. C.,
Attorneys for Appellant,
The Washington Loan and Trust Company.
(No. 8247)

FRANK J. HOGAN,
NELSON T. HARTSON,
Colorado Building,
Washington, D. C.,
Attorneys for Appellant,
The Riggs National Bank of Washington, D. C.
(No. 8248)

GEORGE P. HOOVER,
Investment Building,
WALTER B. GUY,
917 15th Street N.W.,
Washington, D. C.,
Attorneys for Appellant,
The Columbia National Bank of Washington.
(No. 8249)

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED SEP 15 1942

Joseph W. Stewart
CLERK

LIBRARY
THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Jurisdictional statement	2
Statement of the case	2
Outline of pleadings and proceedings	2
Essential facts stated to the jury in the opening statement of George P. Hoover on behalf of the defendants	5
Statutes involved	12
Statement of points on which appellants intend to rely	12
Summary of Argument	15
Argument	19
I. The court below erred in ruling and holding that equitable principle and doctrine that where one of two innocent persons must suffer by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss, is not applicable to the facts stated in the opening statements of counsel for defendants	19
A. Right to recover is governed by equitable principles, and equitable principles of estoppel is applicable	19
B. Cases relied upon by appellants	23
C. Analysis of opinion of court below demonstrates that court erred in holding that equitable principle of estoppel is not applicable to facts here presented	44
II. The government was guilty of negligence in the issuance of the checks sued on, in that it failed to keep proper books and failed to balance and reconcile its books, and such negligence of the government was the proximate cause of the loss for which recovery is sought	50

Page

III. In the issuance of the checks sued on in these causes of action, the government was not acting in its sovereign capacity, but had become a party to commercial paper, and as such was subject to the equitable principle and doctrine of laches 64

Conclusion 71

TABLE OF CASES.

American Hominy Co. v. Milliken National Bank, 273 Fed. 550 24
Armour v. Greene County State Bank, 112 Fed. 631.... 27
Atlantic Coast Line Railroad Company v. Florida, 295 U. S. 301 20

Bartlett, et al. v. First National Bank of Chicago, 247 Ill. 490, 93 N. E. 337 32

Carusi v. Savary, 6 App. D. C. 330 42
Central Trust Co. v. Eureka-Security Fire & Marine Ins. Co., 198 N. E. 62, 50 Ohio App. 308..... 38
Cooke v. United States, 91 U. S. 389 68

Defiance Lumber Co. v. Bank of California, 180 Wash. 533, 41 P. (2d) 135 36

England National Bank v. United States, 282 Fed. 121 70
Erickson Co. v. Iowa National Bank, 211 Iowa 495, 230 N. W. 342 59

Hartford Accident & Indemnity Co. v. Fifth Third Union Trust Co., 23 F. Supp. 53 30
Herrmann, et al. v. Gleason, 126 F. (2d) 936 20

Indianapolis v. National City Bank, 80 Ind. App. 677, 141 N. E. 249 57

Kaszab v. Greenebaum Sons Bank & Trust Co., 252 Ill. App. 107 53

Ladd & Tilton Bank v. United States, 30 F. (2d) 334.. 68
Lanasa Fruit S. S. & I. Co. v. Universal Ins. Co., 302 U. S. 556 63

National Metropolitan Bank v. Realty Appraisal & Title Co., 60 App. D. C. 86, 47 F. (2d) 982.....60, 62

Page

National Safe Deposit Co. v. Hibbs, 229 U. S. 391.... 46
North British and Mercantile Insurance Co. v. Merchants National Bank, 146 N. Y. S. 720, 161 App. Div. 341 56

Osborn, et al. v. Corn Exchange National Bank, 218 Ill. App. 28 58

Pannonia Building & Loan Association v. West Side Trust Co., 93 N. J. Law 377, 108 Atl. 240..... 55
Prudential Insurance Co. v. National Bank of Commerce, 227 N. Y. 510, 125 N. E. 824 54

Royal Indemnity Co. v. Federal Reserve Bank of Cleveland, 38 F. Supp. 621 42

United States v. Clinton National Bank, 28 Fed. 357.. 69
United States v. Commercial National Bank, Law No. 77,050 23-24
United States v. First National Bank of Prague, Okla. 124 F. (2d) 484 40
United States v. Guaranty Trust Company, 293 U. S. 340..... 67
United States v. National City Bank of New York, 28 F. Supp. 144 68

Washington Loan and Trust Company v. Darling, 21 App. D. C. 132 66

Young v. Gretna Trust & Savings Bank, 184 La. 872, 168 So. 85 34

STATUTES CITED

Title 18, Sec. 26, D. C. Code (1929)..... 2
Title 18, Sec. 44, D. C. Code (1929)..... 2
Title 24, Sec. 341, D. C. Code (1929)..... 12
Title 24, Sec. 344, D. C. Code (1929)..... 12

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8247

THE WASHINGTON LOAN AND TRUST COMPANY, A CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee,*

No. 8248

THE RIGGS NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

and

No. 8249

THE COLUMBIA NATIONAL BANK OF WASHINGTON, A CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeals from the District Court of the United States for the District of Columbia.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

These are appeals by appellants, The Washington Loan and Trust Company (No. 8247), The Riggs National Bank of Washington, D. C. (No. 8248), and The Columbia National Bank of Washington (No. 8249), defendants below, from several judgments for United States of America, plaintiff below, entered by the District Court of the United States for the District of Columbia on the several verdicts of a jury rendered by direction of the court, in several consolidated actions to recover certain moneys alleged to be due and payable by each of the defendants below to plaintiff below, by reason of the presentation by said defendants of certain checks, and the payment thereof by plaintiff below.

The District Court had and exercised jurisdiction by virtue of the Act of Congress of March 3, 1901 (31 Stat. 1200, c. 854, Sec. 64), as amended, (D. C. Code (1929), Title 18, Sec. 44).

The jurisdiction of the United States Court of Appeals for the District of Columbia is conferred by the Act of Congress approved February 9, 1893 (27 Stat. 435), as amended, (D. C. Code (1929), Title 18, Sec. 26).

STATEMENT OF THE CASE.

Outline of pleadings and proceedings.

The complaint of plaintiff below is in two counts. The first count is for the recovery of money paid under a mistake of fact. The second count is based upon the alleged guarantee by the defendants below of the prior endorsements appearing upon the checks sued on. (Appellants' App. 2-4.)

To said complaint of plaintiff below, and each count thereof, the defendants below interposed nine defenses. (Appellants' App. 4-10.)

Plaintiff below moved to strike defenses of defendants below numbered Second to Ninth, inclusive, on the ground that

each said defense failed to state a good defense at law, and therefore was immaterial, and after argument, said motion of plaintiff below was denied by the Court below, without prejudice. (Appellants' App. 11.)

Plaintiff below then filed request for admissions of fact by defendants below under Rule 36, Federal Rules of Civil Procedure (Appellants' App. 12-13), which said request was answered by defendants below. (Appellants' App. 14-15.)

Thereafter plaintiff below moved for summary judgment on the ground that there was not involved any genuine issue as to any material fact, and plaintiff below was entitled to judgment as a matter of law. (Appellants' App. 16.)

Thereafter plaintiff below filed additional request for admissions of fact under Rule 36, Federal Rules of Civil Procedure (Appellants' App. 17), which said additional request was answered by defendants below. (Appellants' App. 18-20.)

Thereafter stipulation was entered into between the parties concerning the deposition of one Reno E. Stitely, who had testified by way of deposition as a witness for plaintiff below. (Appellants' App. 21.)

On January 14, 1942, the court below entered an order consolidating for trial the said several causes of action against the defendants below (Appellants' App. 22), and on said date, after argument, entered an order denying the aforesaid motion of plaintiff below for summary judgment. (Appellant's App. 23.)

Thereafter, on March 10, 1942, pursuant to the order of consolidation aforesaid, the said several causes of action came on for trial and were tried together in the court below before Adkins, J. and a jury. (Appellants' App. 23.)

Whereupon Bernard J. Long, Assistant United States Attorney, made opening statement to the jury on behalf of plaintiff below. (Appellants' App. 24-27.)

Thereupon George P. Hoover made opening statement to the jury on behalf of defendants below (Appellants' App.

27-47), and thereafter Nelson T. Hartson made additional opening statement to the jury on behalf of the defendant below, The Riggs National Bank of Washington, D. C. (Appellants' App. 47-48.)

Thereupon, counsel for plaintiff below moved the Court to direct the jury to return verdicts for plaintiff based on admissions of defendants in the file, and the opening statement of the defendants to the jury, on the ground that there is no defense in law stated to the plaintiff's causes of action. (Appellants' App. 48.)

Whereupon the court excused the jury, and counsel for the respective parties presented arguments to the Court below on March 10, 11 and 12, 1942, respectively in support of and in opposition to the said motion of plaintiff below for a directed verdict, and at the conclusion thereof the Court below took under advisement said motion of plaintiff below, and announced an adjournment of the court until Monday, March 16, 1942. (Appellants' App. 48.)

Thereafter, upon resumption of the trial of said causes of action on Monday, March 16, 1942, in ruling on said motion the court below delivered an oral opinion. (Appellants' App. 48-57.)

Thereupon, at the conclusion of the delivery by the court below of the aforesaid oral opinion the said Court granted said motion of plaintiff below, and directed the jury to return a verdict for plaintiff in each of said several causes of action. (Appellants' App. 57.)

Pursuant to the direction of the court below the jury returned a verdict for plaintiff below against The Washington Loan and Trust Company, in the sum of $29,286.82, against The Riggs National Bank of Washington, D. C., in the sum of $3,864.86, and against The Columbia National Bank of Washington in the sum of $48,602.57, with interest on each of said sums of money from January 25, 1938. (Appellants' App. 57-58.)

Thereupon, on each of said verdicts in each of said several causes of action, judgment for plaintiff against defendant

in the several sums of money aforesaid was severally entered in the Court below (Appellants' App. 58-62.)

Defendants below gave due notices of appeal to this court from the said several judgments in the court below, and said several appeals were duly perfected.

Thereafter, pursuant to Rule 12(c) of this court, counsel for the respective parties entered into a stipulation wherein and whereby it was agreed that a consolidated record be prepared by the clerk of the court below, and designating the matter to be included therein.

Thereafter, pursuant to motion of appellants, this court entered an order consolidating for hearing the said several causes of action.

For convenience, appellants (defendants below) will be referred to sometimes hereinafter as the defendants or the "bank" or "banks", and the appellee (plaintiff below) will be referred to as the plaintiff or the "government".

Essential facts stated to the jury in the opening statement of George P. Hoover on behalf of the defendants.

Sometime in December, 1931, or January, 1932, one Reno E. Stitely became chief of the voucher unit of the accounts section of the National Park Service. (Appellants' App. 31.)

Between September 19, 1932 and June 3, 1933, Stitely falsified 24 vouchers, involving 113 checks, aggregating $7,355.19, and fraudulently obtained that amount of money from certain funds which had been allocated to certain activities, other than the Civilian Conservation Corps camps, under the jurisdiction of the National Park Service. (Appellants' App. 34.)

On April 10, 1933, pursuant to terms of the National Recovery Act (Act of March 31, 1933) the President of the United States issued a proclamation for the establishment of Civilian Conservation Corps camps in various national and state parks throughout the United States; under the terms of the executive order issued by the President, the

Chief of Finance of the United States Army was made the disbursing officer to disburse all funds allocated for the various C. C. C. camps. (Appellants' App. 31.)

Among the parks in which the C. C. C. camps were established was the Shenandoah National Park, in Virginia. (Appellants' App. 33.)

During the period from July 1, 1933 to the end of March, 1937 there were in the Shenandoah National Park five or six real camps in which they had enrollees. (Appellant's App. 35.) In each of the five or six real camps in the Shenandoah National Park, in addition to the enrollees, they had a civilian facilitating personnel, consisting of one superintendent and eight foremen. (Appellants' App. 36.)

Beginning with the pay day, July 15, 1933, and continuing to the end of March, 1937, said Stitely made up fraudulent pay roll vouchers for fictitious or non-existent civilian employees for an imaginary C. C. C. camp in the Shenandoah National Park. (Appellants' App. 35-36.)

In making up the fraudulent pay rolls, Stitely had them conform to the pay rolls for the civilian facilitating personnel in each of the real camps, consisting of one superintendent and eight foremen. (Appellants' App. 36.)

Under the Economy Act of 1933, the wages of the civilian employees in the real C. C. C. camps were reduced fifteen per cent. Stitely, in order to have the non-existent, fictitious men in the imaginary camp conform to the practices in the real camps, in making up the fraudulent pay roll vouchers he made a reduction of fifteen per cent in the wages of the fictitious men whose names appeared on the fraudulent pay rolls. Whenever there were reclassifications, increases or deductions of salaries of the civilian employees in the real camps, Stitely made up the fraudulent pay rolls for the imaginary camp to conform to the legitimate pay rolls for the real camps. (Appellants' App. 36.)

During the period from July 1, 1933 to March 31, 1937, Stitely had been going to the office of the Chief of Finance of the War Department each pay day (twice a month).

Stitely took with him, or there had been sent to the Finance Office, the legitimate or long form pay roll voucher, containing the names of the employees in the National Park Service in Washington. (Appellants' App. 33.)

Stitely took along with him to the Finance Office the fraudulent or short form pay roll voucher, explaining that the reason he brought over the short form pay roll voucher was because of the fact that the superintendent of the Shenandoah National Bank came into Washington every pay day, that some of the men working in the camp were scattered around, working in different places, and it was impossible to have the pay roll made up before the pay day, and for that reason he brought over the short form pay roll voucher on pay days. Stitely waited in the Finance Office until the checks were made up covering the fraudulent pay roll voucher. (Appellants' App. 35.)

Stitely received from the Finance Office the checks in payment of both the legitimate and the fraudulent pay roll vouchers, the former he took to the office of the National Park Service and they were distributed to the payees. The checks made payable to the fictitious payees, whose names appeared on the fraudulent pay roll vouchers, he retained, forging the names of the payees and receiving the money on said checks. (Appellants' App. 35.)

When the pay rolls, both legitimate and fraudulent, were made up there was an original and two copies, all of which went to the Finance Office, which retained the original and one copy, and later the original was sent to the General Accounting Office. The remaining copy was to be sent or returned to the National Park Service, but Stitely got that copy of the fraudulent voucher and destroyed it. (Appellants' App. 35.)

In each of the five or six real camps in the Shenandoah National Park they had enrollees who were paid by the Finance Office of the War Department. In the War Department, and in the National Park Service they had inspectors whose duty it was to inspect the C. C. C. camps, but none of

the inspectors of either service ever discovered that this camp for which Stitely was making up the fraudulent pay rolls was only an imaginary camp. (Appellants' App. 37.)

Some time in April, 1937 the National Park Service undertook to draw on a fund, designated as the working fund, which was being disbursed by the disbursing officer of the Treasury Department, in payment of the rental for space which the Park Service occupied in the Bond Building. According to the books in the National Park Service there was in said fund a balance of $7,000, and according to the books in the disbursing office of the Treasury the balance was only about $300. This discrepancy caused inquiry to be made of the General Accounting Office, which revealed that during the period between April 17, 1936 and August 15, 1936, Stitely had falsified five vouchers on said working fund, involving 54 checks, amounting in all to $6,855.60. (Appellants' App. 32.)

On April 9, 1937 when inquiry was made of the General Accounting Office regarding the vouchers concerning the working fund, Stitely knew of it, and realizing he was about to be exposed he pretended to be sick and went home. (Appellants' App. 32.)

On the next pay day, April 15, 1937, Stitely not being at the office, a young lady from the National Park Service took to the office of the Chief of Finance in the War Department the legitimate or long form pay roll. One of the clerks in the office of the Chief of Finance asked her, "Where is the short form payroll?", and she knew nothing about it. She reported this incident to her chief in the National Park Service, who got in touch with the chief clerk of the Finance Office, and it was then revealed that Stitely had been going every two weeks to the office of the Chief of Finance during all of this period (July 15, 1933 to March 31, 1937) and taking over this fraudulent short form pay roll voucher. (Appellants' App. 33-34.)

Following this an investigation was made by the Bureau of Investigation of the Interior Department which revealed

that Stitely had falsified in all, 134 pay roll vouchers, comprising 1116 checks, aggregating $84,880.03, which included the falsification of pay roll vouchers relating to the C. C. C. camps between July 1, 1933 and March 31, 1937, involving 91 pay roll vouchers and 799 checks, aggregating $57,512.64. (Appellants' App. 34.)

At the beginning of the activities in connection with the C. C. C. camps, which were established about July 1, 1933, several conferences were had between representatives of the National Park Service, and of the Finance Office, United States Army, with a view to arranging some system of accounting between the two offices. (Appellants' App. 37.)

The legitimate pay roll vouchers which were made up for the C. C. C. camps in the various parks contained certain symbols, relating to procurement, purpose number, and designation of appropriation, but did not contain any symbol designating the particular park in which the camp was located, or whether the park was in the eastern or western part of the United States. The pay roll vouchers did not contain any symbol showing where the camp was located, and there was no means of checking the pay roll vouchers. This was likewise true as to the fraudulent vouchers. (Appellants' App. 38.)

This condition continued, without proper books being kept, until about July 1, 1936, at which time conferences were had between representatives of the National Park Service and of the Finance Office, United States Army, as a result of which the National Park Service in October, 1936, received additional information from the Finance Office covering the period only to July, 1936. (Appellants' App. 38.)

After the exposé of Stitely in April, 1937, the Acting Secretary of the Department of the Interior on June 15, 1937, requested of the War Department additional information showing the designation of the camp and the park, covering the period from the time the C. C. C. camps were established in 1933 up to the time of the request (June 15, 1937), and this additional information was furnished on August 3, 1937. (Appellants' App. 39.)

During this period from 1932 (1933) to 1937, the National Park Service did not keep a proper set of books, they did not have any books at all, that is, books showing what was being done with the money and how it was being expended, nor did they receive from the War Department proper statements so that they could have reconciled or balanced their books to show where this money was expended. (Appellants' App. 39.)

If Stitely had not been caught in the falsification of the vouchers in connection with the limited amount of about $7,000 in the working fund, he may have gone on until the whole of the C. C. C. funds had been exhausted. (Appellants' App. 39.)

Stitely knew that the National Park Service did not keep proper books, and that they could not balance the books. If proper books had been kept, Stitely's defalcations could have been discovered. (Appellants' App. 39-40.)

Stitely told Burroughs, chief clerk, Finance Office, United States Army, of lavish trips he had taken to Florida. Although Stitely took trips away, he was always on hand on pay days to present the false vouchers so as to get the checks. (Appellants' App. 40.)

On September 28, 1935, the President of the United States made an address directed to all of the banks in the Country, calling upon the banks to cooperate with the government in cashing government pay roll checks in connection with such activities as the Works Progress and the C. C. C. camps. (Appellants' App. 40.)

Stitely was a depositor in the West End Office of the defendant, The Washington Loan and Trust Company. (Appellants' App. 41-43.)

Each of the checks sued on in the cases against The Washington Loan and Trust Company and The Columbia National Bank of Washington was either cashed or deposited by Stitely in the West End Office of The Washington Loan and Trust Company. Out of the total number of 700 or more checks sued on in said causes, only about 70

checks were deposited by Stitely, and the remainder thereof were cashed by him. (Appellants' App. 44.)

The dealings Stitely had with The Washington Loan and Trust Company were ordinary dealings which any depositor would have with any bank in the District of Columbia; there was nothing unusual about his transactions with the bank to attract attention or to cause suspicion, and the bank had no notice that the checks sued on had been forged by Stitely until after the exposé had been made. (Appellants' App. 43.)

Because of the proximity of the West End Office to many of the government buildings, government checks aggregating several hundred thousand dollars were cashed on pay days. It was a common practice for employees in various government departments to come to the bank and bring not only their own checks, but the checks of other employees. One man might either cash or deposit as many as ten, fifteen or more checks, even as many as twenty-five. That was an ordinary and usual practice. When Stitely came to the bank and was doing the same thing, there was nothing unusual about what Stitely was doing to attract the attention of the officers or employees of the bank to anything that might reveal any dishonesty on his part, and there was nothing suspicious about it. (Appellants' App. 44.)

That by reason of this long course of conduct, when Stitely came to the bank to present these checks for deposit or for cash, as the case may be, the defendants believed, and had every reason to believe that Stitely had the right to present the checks for deposit or to receive payment for them, and by that course of conduct the defendants were misled by the government, and therefore, the defendants invoke what is known as the equitable doctrine of estoppel, and shall request the court to instruct the jury that in a case of this kind, where one of two innocent persons must suffer, the one who should in equity and good conscience be required to bear the loss is the one who made it possible for the third person to perpetrate the fraud, and that is the government in this case. (Appellants' App. 30-31.)

STATUTES INVOLVED.

The statutes involved are Title 24, Sec. 341, D. C. Code (1929) (Limitation of Actions):

> "No action shall be brought * * * upon any simple contract, express or implied, * * * after three years from the time when the right to maintain any such action shall have accrued." (Mar. 3, 1901, 31 Stat. 1389, c. 854, Sec. 1265; June 30, 1902, 32 Stat. 542, c. 1329),

and Title 24, Sec. 344, D. C. Code (1929) (Action by the United States):

> "None of the provisions of sections 341 to 343, inclusive, of this title shall apply to any action in which the United States is the real and not merely the nominal plaintiff." (Mar. 3, 1901, 31 Stat. 1389, c. 854, sec. 1268; June 30, 1902, 32 Stat. 542, c. 1329.)

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY.

1. The court erred in granting the motion of plaintiff for directed verdict, and in directing the jury to return a verdict for plaintiff.

2. The court erred in holding and ruling, as a matter of law, that upon the facts stated to the jury in the opening statements of counsel for defendants the negligence of plaintiff was not the proximate cause of the loss claimed to have been sustained by plaintiff by the presentation for payment, and the payment, of the checks sued on.

3. The court erred in holding and ruling, as a matter of law, that the facts stated to the jury in the opening statements of counsel for defendants did not present any issuable fact which properly should have been submitted to the jury as to whether, upon such facts, the negligence of plaintiff was the proximate cause of the loss claimed to have been sustained by plaintiff by the presentation for payment, and the payment, of the checks sued on.

4. The court erred in refusing to allow defendants to go to the jury, and to submit evidence in support of the facts stated to the jury in the opening statements of counsel for defendants, on the question as to whether the negligence of plaintiff was the proximate cause of the loss claimed to have been sustained by plaintiff by the presentation for payment, and the payment, of the checks sued on.

5. The court erred in holding and ruling, as a matter of law, that the equitable principle and doctrine that where one of two innocent persons must suffer loss by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss, was not applicable to the facts stated to the jury in the opening statements of counsel for defendants.

6. The court erred in holding and ruling, as a matter of law, that the facts stated to the jury in the opening statements of counsel for defendants did not present any issuable facts which should have been submitted to the jury as to whether, upon such facts, the jury could properly have applied the equitable principle and doctrine that where one of two innocent persons must suffer loss by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss.

7. The court erred in refusing to allow defendants to go to the jury, and to submit evidence in support of the facts stated to the jury in the opening statements of counsel for defendants, and in refusing to submit to the jury the question as to whether, upon such facts, they properly may have applied the equitable principle and doctrine that where one of two innocent persons must suffer loss by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss.

8. The court erred in holding and ruling that the statute of limitations did not apply to the United States of America in these causes of action.

9. The court erred in holding and ruling that the equitable principle and doctrine of laches did not apply to the United States of America in these causes of action.

10. The court erred in refusing to hold and rule that in these causes of action the United States of America was not acting in its sovereign capacity, but had become a party to commercial paper, and as such it had abandoned its character as sovereign, and had submitted itself to all of the responsibilities of a private individual in like position.

11. The court erred in refusing to hold and rule that in dealing with commercial paper, the United States of America is subject to the equitable principle and doctrine of laches the same as any private litigant in like position.

12. The court erred in refusing to allow defendants to go to the jury, and to submit evidence in support of the facts stated to the jury in the opening statements of counsel for defendants, on the question as to whether, upon such facts, they properly may have applied the equitable principle and doctrine of laches in bar of the whole or any part of the causes of action of plaintiff. (Appellants' App. 63-65.)

SUMMARY OF ARGUMENT.

I.

The equitable principle and doctrine (presented by defendants' seventh defense) (Appellants' App. 9) that where one of two innocent persons must suffer by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss, is applicable to the facts stated to the jury in the opening statements of counsel for defendants, and the court below erred in refusing to so hold.

Although the several actions of the government are such as were formerly recognized as actions at law, nevertheless, they are in the nature of equitable actions, and the right to recover is governed by equitable principles. The actions are based upon the principle that the banks have received money of the government which, according to equity and good conscience, they should not be permitted to retain.

The facts stated in the opening statement of counsel for defendants clearly show that the government was guilty of gross negligence in the issuance of the checks sued on; that because of the negligence of the government in the issuance of the checks the banks were misled, and by reason of such negligence of the government, the banks believed, and had every reason to believe, that when Stitely came to the bank and presented the checks to be cashed or for deposit that he had the right so to present the checks.

The government negligently permitted the checks to be issued over a period beginning November 4, 1932, and continuing to March 25, 1937, and by reason of this continued course of negligent conduct by the government, the banks were misled.

In addition, as appears in the opening statements of counsel for defendants (Appellants' App. 40), the President of the United States, in an address made on September 28, 1935, to all of the banks of the country, called upon the banks to cooperate with the government in cashing the

checks. This imposed upon the government a greater duty of exercising reasonable care in the conduct of its business in relation to the issuance of said checks.

(Under this heading will be discussed points numbered 1, 5, 6 and 7 relied upon by appellants.) (Appellants' App. 63-64.)

II.

The facts stated to the jury in the opening statements of counsel for the defendants show that the government was guilty of negligence in that during the period from the issuance of the first check dated November 4, 1932, to the issuance of the last check, dated March 25, 1937, it failed to keep proper books, and failed to balance or reconcile its books, so as to enable the government to detect the continuous frauds which were being perpetrated upon the government by its employee, Stitely.

Stitely set up an imaginary C. C. C. camp in the Shenandoah National Park in Virginia in July, 1933, made up false pay roll vouchers containing fictitious names of alleged civilian employees, obtained checks in payment thereof every pay day (twice each month) and continued to do this up to and including March 31, 1937.

The facts stated in the opening statements show that the government was guilty of the grossest sort of negligence in the issuance of the checks sued on, that the banks were misled thereby, that such negligence constituted a breach of the duty owing by the government to the banks, and such negligence of the government was the proximate cause of the loss for which recovery is sought in the several causes of action against the banks.

It should be borne in mind that these causes of action do not involve an isolated transaction, but on the contrary, involve numerous transactions extending over a period of more than four years.

The defendants were damaged by said negligence of the government, and such negligence was the proximate cause thereof, for the reason that the banks were misled by the

continued negligent issuance of the checks by the government over a long period, i. e., more than four years.

This is especially true since the President of the United States called upon the banks to cooperate with the government in cashing the checks.

As a necessary result of the address of the President of the United States, made on September 28, 1935, calling upon the banks to cooperate in the cashing of the checks, there was imposed upon the government the duty, which it owed the banks, of exercising reasonable care in the conduct of its business in relation to the issuance of the checks so as to prevent the continued perpetration of fraud upon its officers and agents in the issuance thereof.

(Under this heading will be discussed points numbered 1, 2, 3 and 4, relied upon by appellants.) (Appellants' App. 63.)

III.

The facts stated in the opening statements of counsel for defendants clearly show that in the issuance of the checks sued on in these causes of action, the government was not acting in its sovereign capacity, but had become a party to commercial paper, as such had abandoned its character as sovereign, and had submitted itself to all of the responsibilities of a private litigant in like position.

In these causes of action the government is asserting a pecuniary demand against the banks; in such case the government is not entitled to relief except upon terms which do justice to the government and the banks, as determined by equitable principles applicable in like case as between private litigants.

The court erred in refusing to rule and hold that in dealing with commercial paper the government is subject to the equitable principle and doctrine of laches, the same as any private litigant in like situation, and in refusing to rule and hold that the equitable principle and doctrine of laches was applicable to the facts stated in the opening statements of counsel for defendants.

Since these actions are equitable in nature, in considering the question of the application of the equitable principle of laches, while, as a matter of law, it is true that the statute of limitations may not be applicable, nevertheless, we maintain that in determining the question of laches the bar of the limitations may be applied by analogy in the same way as at law.

In cases of this nature equity follows the law, and in determining the question of laches, the statutory period is the measure to be applied.

In these actions the rights of the banks against the government, as the holders of its checks drawn on the Treasurer of the United States, are the same as those accorded by commercial practice to the checks of private individuals, and by reason thereof the equitable doctrine of laches is applicable.

The causes of action of the government, being in the nature of equitable actions, the government must do equity before it can recover. Since in actions of such a nature the government must recover, if at all, by virtue of the application of equitable principles, it likewise results that the equitable principle of laches may be applied in denial of the right of recovery.

On each of the checks sued on, the right of action, if any, of the government against the banks, accrued upon the presentation to and payment by the government of each said check, and in determining the question of laches, the measure of time runs from the date of the presentation and payment of each said check.

(Under this heading will be discussed points numbered 8, 9, 10, 11 and 12 relied upon by appellants.) (Appellants' App. 64-65.)

ARGUMENT.

I.

The court below erred in ruling and holding that the equitable principle and doctrine that where one of two innocent persons must suffer by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss, is not applicable to the facts stated in the opening statements of counsel for defendants.

The equitable principle and doctrine that where one of two innocent persons must suffer by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss, is invoked by the seventh defense of defendants below. (Appellants' App. 9.)

A.

RIGHT TO RECOVER IS GOVERNED BY EQUITABLE PRINCIPLES, AND EQUITABLE PRINCIPLE OF ESTOPPEL IS APPLICABLE.

Upon the facts stated in the opening statements, we maintain that the banks had, and have, the right to invoke this equitable principle and doctrine of estoppel, and it was clearly error for the court below to hold and rule that said equitable principle and doctrine is not applicable to said facts, and in directing the jury to return verdicts for plaintiff below.

It is well settled that the several actions of the government against the banks are in the nature of equitable actions, even though such actions may formerly have been recognized as actions at law. The right of the government to recover is based upon and governed by equitable principles. The right of the government to recover is founded upon the equitable principle that the banks have received money which in equity belongs to the government, that it would be inequitable and unconscionable to permit the banks to retain said money, and that the retention of said money by

the banks would result in unjust enrichment of the banks.

Herrmann, et al. v. *Gleason,* 126 F. (2d) 936 (C. C. A., 6th Cir., 1942):

McAllister, Circuit Judge, in speaking of an action for money had and received, said (p. 939):

> "* * * The action resembles a bill in equity and lies when money has been received by one person which, in justice and equity, belongs to another; and, in such a case, a promise is implied because natural justice requires it in consequence of some benefit received. Osborn v. Bell, 5 Denio 370, 49 Am. Dec. 275. An action for money had and received, though brought at law, is in its nature a substitute for a suit in equity, and it is to be determined by the application of equitable principles. 'In other words, the rights of the parties are to be determined as they would be upon a bill in equity.' Myers v. Hurley Motor Co., 273 U. S. 18, 47 S. Ct. 277, 278, 71 L. Ed. 515, 50 A. L. R. 1181. Recovery in such an action is based on the law of quasi contracts, and is ordinarily permitted only when there has been an 'unjust enrichment'."

Atlantic Coast Line Railroad Company v. *Florida,* 295 U. S. 301 (1935):

Mr. Justice Cardozo, in speaking of an action for restitution, said (p. 309):

> "* * * A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. (Citations) The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."

From the facts stated, it is obvious that the government was guilty of gross negligence in the issuance of the checks sued on. The government negligently permitted the checks to be issued over a period of more than four years, beginning November 4, 1932, and continuing to March 25, 1937, and by reason of said negligence of the government in the

issuance of the checks, the bank believed, and had every reason to believe, that when Stitely came to the bank and presented the checks either for deposit or to be cashed, that he had the right so to do. Because of such negligence of the government, the bank was misled.

By reason of this continued course of negligent conduct by the government, the bank was misled and induced to believe, and to continue to believe, that the endorsement of the payee was genuine, and was induced to accept, and to continue to accept, said checks as genuine.

It should be borne in mind that over a period of many years it had been the practice of the bank to cash or accept for deposit numerous checks, amounting to several hundred thousand dollars, presented by employees of the government on pay days, and that in numerous instances the checks so presented were payable to payees other than the employee presenting the checks. Consequently, when Stitely presented the checks sued on, there was nothing unusual about his transactions with the bank to attract the attention of the officers or employees of the bank, or to arouse their suspicions.

Moreover, as appears in the opening statements (Appellants' App. 40), the President of the United States called upon the banks to cooperate with the government in cashing the checks. The address of the President was undoubtedly considered by the banks in the nature of a mandate, and unquestionably the banks felt obligated and in duty bound to cooperate with the government.

Since the government called upon the banks to cooperate in the cashing of the checks, there was imposed upon the government a greater duty of exercising reasonable care and caution so as to prevent fraud in the issuance of the checks.

We maintain, upon the facts stated, and in the light of the circumstances disclosed by such facts, that the government owed to the banks the duty of exercising reasonable care and caution so that the checks would be properly issued, and to take all necessary precautions so as to prevent the

issuance of the checks in such negligent and careless manner, as shown by the facts stated in the opening statements. The facts stated make it obvious that the negligence of the government in the issuance of the checks put it in the power of its dishonest employee and furnished the means to enable him to perpetrate the fraud upon the government and to continue the perpetration of such fraud over a period of more than four years.

Moreover, we maintain that upon the facts stated, and in the light of the circumstances here disclosed, the banks in accepting and continuing to accept the checks as genuine, had the right to rely, and did rely, upon the obligation and duty of the government to take the necessary precautions in order to set up and maintain a proper system of bookkeeping so as to prevent the continued perpetration of the fraud upon the government in the issuance of the checks.

In addition, it should be borne in mind, in considering the question here presented, that we are dealing with an equitable cause of action in which it must appear that it would be inequitable and unconscionable to permit the banks to retain the money paid by the government upon presentation of the checks sued on in order to entitle the government to recover in these actions.

It should likewise be borne in mind that in considering the equitable principle and doctrine presented by the seventh defense of the defendants, and the facts stated in support of said equitable principle and doctrine, that there is not here involved any question as to whether the negligence of the government was the proximate cause of the loss for which recovery is sought, but the sole question involved is whether the negligence and fault of the government made it possible for the wrongdoer to perpetrate the fraud.

Upon the facts stated, it is obvious that the negligence and fault of the government provided the means and made it possible for Stitely to perpetrate, and to continue to perpetrate, the fraud over a period of more than four years. In the light of such facts it would not be inequitable or against good conscience to deny the right of the plaintiff

below to recover the money paid by the government upon the presentation of the checks, even though the banks had in fact retained the money. On the contrary, it would be inequitable and unconscionable for the government to be permitted to shift to the banks the loss attributable solely to the negligence and fault of the government, and thereby to burden the banks with such loss, which in equity and good conscience should be borne by the government. Moreover, it appears that the banks have paid over to Stitely the proceeds of the checks, and if the government is required to bear the loss it will not result in unjust enrichment of the banks.

B.

CASES RELIED UPON BY APPELLANTS.

The foregoing equitable principle and rule was applied by Justice Bailey in the case of *United States* v. *Commercial National Bank, At Law No. 77,050,* in the Supreme Court of the District of Columbia (now District Court).

In that case the material and controlling facts were almost identical with the facts here presented. By the stipulation of facts therein it appears a certain employee of the District Government and a confederate evolved a fraudulent scheme, whereby they obtained the issuance of vouchers purporting to refund payment of taxes; upon such fraudulent vouchers, checks of the disbursing officer of the District of Columbia were drawn on the Treasurer of the United States, payable to certain named payees purporting to be entitled to tax refunds; said dishonest employee of the District Government and his confederate obtained possession of said checks, and endorsed thereon the names of the payees; the confederate of said employee deposited said checks in an account which he opened in the name of a fictitious person; said checks were deposited in, and endorsed by, the Commercial National Bank, presented by it to the Treasurer of the United States, and the Treasurer made payment thereof. Said cause of action involved some six checks.

By stipulation of counsel the case was tried to the Court without a jury. Justice Bailey rendered a verdict for the defendant, in which he applied the equitable principle and rule here contended for by defendants, that where one of two innocent parties should bear the loss, the party whose act or omission occasioned the loss must bear it.

Justice Bailey in his opinion, filed July 7, 1933, said:

> "Those who were primarily at fault in this case were the employees of the District of Columbia and not the defendant bank.
>
> "In the case of U. S. v. National Exchange Bank, 214 U. S. 302, the forgeries were committed by those who were not in the employ of the United States and the situation there was quite different from that in the instant case.
>
> "In my opinion, therefore, as between the plaintiff and the defendant, the loss should fall upon the party through whose employees the first fault occurred, and I therefore find for the defendant."

An examination of the docket entries in *United States* v. *Commercial National Bank, supra,* reveals that on July 13, 1933 judgment for defendant was entered on verdict of Justice Bailey and no appeal was taken by plaintiff from said judgment.

Moreover, the equitable principle and rule here invoked has been applied by the federal courts and the state courts, in many cases presenting essential facts similar to the facts here presented. The following cases support the equitable principle and rule, the application of which is here contended for by defendants.

(For the convenience of the court we have set out somewhat at length on this brief the facts and opinion of the court in the cases upon which we rely:)

American Hominy Co. v. *Milliken National Bank,* 273 Fed. 550 (District Ct., S. D., Ill., 1920):

Action by American Hominy Co. against the bank. The case was tried by the court without a jury. The court

found the issue for the defendant and entered judgment for defendant.

Plaintiff owned and operated an elevator at Garber, Ill., and maintained a branch office at Decatur under the name, Suffern-Hunt Mills, Branch American Hominy Company, and owned several other elevators. John C. Meyer was local managing agent of plaintiff at Garber and was authorized to draw drafts on plaintiff in payment of grain purchases. For this purpose blank forms of drafts were supplied him by plaintiff. Between June 8, 1914, and June 5, 1917, among others, Meyer issued 129 drafts signed by him as agent, intending to obtain the proceeds of them himself. He then forged the names of the purported payees on the back, and on some of them he endorsed his own name also, and negotiated them through banks in Gibson City. A number of them were negotiated by Meyer through one G. G. Eddy, engaged in the speculative grain business at Paxton, and some of them through Bennett & Co., Board of Trade operators in Chicago. Reaching defendant in the regular course of business, the drafts were presented to plaintiff and paid. Plaintiff discovered the forgeries in June, 1917, and notified defendant, demanding repayment. On November 7, 1917, a formal tender of the drafts was made to defendant.

During the period of the transactions a representative of plaintiff called several times at the Garber elevator to discuss repairs, etc. It was reported to plaintiff's officers at Decatur that Meyer was speculating on the Board of Trade, and when plaintiff's cashier asked Meyer about it, he was informed by Meyer that he had a few trades but they were then all closed. Also in several instances Meyer had offered to pay farmers in excess of the market price if they would wait for their pay; that he was storing grain in the elevator in violation of Illinois regulations. Plaintiff's officers knew that Meyer operated a small general store on his own, and they notified him that if he was cashing customers' drafts in his store, he should issue his own checks

for the balances. At no time was the grain in the elevator checked up to see if the proper amount was there, nor was any particular draft checked up with the sales record to see whether the amount of grain paid for was received by Meyer.

The court first held that the drafts were drawn to fictitious persons and under the Negotiable Instruments Law were payable to bearer. In dealing with the question here presented, Fitzhenry, District Judge, said (p. 556):

> **"This is an action in assumpsit, under the common counts, for money had and received. The right to recover is governed by principles of equity, although the action is at law. The action is maintainable in all cases, where one person has received money, or its equivalent, under such circumstances that, in equity and good conscience, he ought not to retain it and which ex aequo et bono belongs to another.** (Citations.)
>
> "In determining the equities in this case, it must be considered that there is no suggestion of negligence on the part of the defendant, and that the presenting holder or indorsee is not presumed to have any knowledge of the arrangement between the drawer and drawee. However, the plaintiff, for more than 10 years prior to the commencement of this suit, maintained John C. Meyer as its local managing agent in charge of its elevator, at Garber, Ill. All of the plaintiff's business, of buying and shipping grain at and from that point, was transacted for it by Meyer. He paid for the grain he bought with drafts drawn by him, as agent, upon the plaintiff as drawee, under the name of Suffern-Hunt Mills, Branch American Hominy Company. Each draft was a plain order to pay money. However, there were blank spaces provided upon the face of each draft, which, when filled by Meyer, showed the amount, kind of grain, and price per bushel for which each draft was supposed to have been issued. Meyer made daily reports of his purchases, and when the various drafts were presented by the defendant for payment they would be paid, upon checking them up with the daily reports.

"At no time before the issuing of the first and last drafts sued upon in this case was any inspection made of the grain in the elevator, or of the grain received and weighed as shown by the scales record, to ascertain whether or not Meyer had received the grain for which he had issued drafts. A checking up of any of the drafts at any time with Meyer's records and the grain in the elevator in all probability would have disclosed the fraud. The plaintiff was at liberty to make this investigation; the defendant was not and could not have done so."

At page 558 the court said:

"Plaintiff was bound to know the signature of Meyer, and its officers and agents at Decatur certainly did know it. To one familiar with his handwriting, the similarity in the writing of the indorsements of the payees' name to the names as written in the bodies of the drafts might be suggested, while a stranger would not be likely to have his suspicions aroused. But, aside from that, it is perfectly apparent that an occasional checking up of Meyer's transactions undoubtedly would have shown the truth. In the diligent prosecution of its business, plaintiff should have done this. After permitting Meyer to run its business with a free hand all the years covered by these drafts, and paying them upon presentment, plaintiff cannot now be permitted to dishonor them. * * *"

"The rule is that, where one of two persons must suffer loss, he who by his negligent conduct made it possible for the loss to occur must bear it. Whatever neglect there was, was on plaintiff's side. Price v. Neal, 3 Burrows, 1354. It is his duty to use reasonable and ordinary precaution to avoid imposition, for it is against reason that a party who stands fair should suffer for the negligent conduct of another." (Emphasis ours.)

Armour v. *Greene County State Bank,* 112 Fed. 631 (C. C. A., 7th Cir., 1902):

Suit by Armour & Co. against the bank. A jury having been waived, the case was tried by Circuit Court. Judg-

ment for defendant, and plaintiff brings error. Judgment affirmed.

Armour & Co. had a purchasing agent in Farlin, Iowa, to buy corn from farmers. He paid for it by drawing checks upon defendant bank, which by agreement with plaintiff, it honored, and at intervals, when a number had accumulated, the bank was reimbursed by a draft on plaintiff for their totals.

Plaintiff's agent, A. C. Morlan, drew checks totalling $2764.11, payable ostensibly to certain farmers in the vicinity, and forged their endorsements on the back and received payment from defendant, and it in turn was reimbursed by plaintiff. These checks though purporting on their face to be for corn were in fact fraudulent. They ran over the period from October, 1898 to May, 1899. No loss or fraud was discovered by plaintiff until April, 1899, when an inspection of the cribs by an agent of plaintiff showed that they contained less corn than the memoranda on the checks called for. The Circuit Court found as a fact that plaintiff's negligence in failing to examine the checks forwarded to them contributed materially to the loss.

In delivering the opinion of the court, Grosscup, Circuit Judge, said (p. 632):

> "We find in the record no evidence sufficient to overthrow the Court's finding of fact in this respect. **A large proportion of the checks in question bore the endorsement of Morlan himself. If this was irregular, the bank should have been notified by Armour & Co. as soon as the practice began. In the absence of such notice, Morlan's endorsement was in effect a certificate by the drawer of the genuineness of the endorsement of the payee.** The bank, so long as it acted in good faith, could not be expected to look beyond such a certificate.
>
> "Nor were Armour & Co. in another respect, without fault. The checks each bore a memoranda of the amount of purchase. The period over which they ran was from October to April. The truthfulness of the memoranda could have been tested at any time by an inspection of the corn in the cribs. Such inspection was

within the power of Armour & Co., but not within the duty undertaken by the bank. **A failure to make it by the former, at apt times, lies at the bottom of this loss; and its consequence ought not to be visited upon the bank.**

"Of course, if the relationship between the parties was that of banker and depositor, these facts relating to negligence are largely immaterial. But in our opinion, such legal relationship is not applicable to the transactions under consideration. Clearly, a deposit for safe keeping was not intended, except to the extent of making the bank Armour & Co.'s disbursing agent. The transaction more nearly resembles the drawing of inland bills of exchange; in which case, it is well settled, that the drawee cannot recover back money paid to the holder. Horstman v. Henshaw, 11 How. 177, 13 L. Ed. 653.

"Neither of these legal relationships, however, seem to exactly fit the transactions. Armour & Co. were large purchasers of corn in this and other districts. Though their transactions could have been carried forward through their purchasing agent alone, by entrusting him with the custody of the funds, they chose, out of considerations largely of bookkeeping, to have an independent disbursing agency. The disbursing agent was the bank. Its duty, in effect, was to pay for such corn as Morlan should report through his checks. The bank's obligation under such circumstances was that simply of ordinary care and good faith. It had the right, in the absence of facts putting it upon notice, to rely upon Morlan's integrity. It was intrusted with no power to supervise or change his method of transacting the business in hand, and, as has already been stated, there is no evidence impeaching the bank's good faith, or disclosing facts that ought to have put it upon its guard. **The bank was, therefore, guiltless of negligence, and laying aside, for the time, any consideration of Armour & Co.'s negligence, the case is one, where one of two innocent parties, standing in equal relation as to obligation must suffer through the fraud of a third. By a familiar maxim of the law, the loss in such case must fall upon Armour & Co., who, by their selection of Morlan in the first instance, made the loss possible.**" (Emphasis ours.)

Hartford Accident & Indemnity Co. v. *Fifth Third Union Trust Co.*, 23 F. Supp. 53 (Dist. Ct., S. D. Ohio, 1938; affirmed, 111 F. (2d) 762):

Action by Hartford Co., as insurer under a forgery insurance policy of the Phoenix Indemnity Co. against the bank to recover $6,000 paid by the Phoenix Co. to the bank on a draft the endorsement on which was a forgery. Order dismissing plaintiff's petition.

Harry Neal Smith, an attorney, was the Cincinnati representative of the Phoenix Co., acting as claim adjuster and attorney. He was supplied with a book of blank forms for drafts upon the Phoenix Co. which he was authorized to draw when the company had ratified settlement or payment of a claim. Smith acted in a similar capacity for some 14 other indemnity and casualty companies, and was well known to the officers of defendant and other banks in Cincinnati. He bore a good reputation at the time.

On January 29, 1934, one Albert Keniston asserted a claim for personal injuries received through the negligence of one of the Phoenix policy-holders. Smith drew a draft in the amount of $6,000 payable to Keniston, purportedly in settlement of his claim. Although the Phoenix Co. had authorized settlement in that amount, no agreement had been reached with Keniston, and Smith testified that he had no intention that Keniston should receive the proceeds of it. On January 29, 1934, Smith went to defendant bank with Robert E. Jones, one of his employees. Before approaching the teller's window, Smith endorsed the name of Keniston on the back of the draft. He had Jones prepare a deposit slip listing the draft, and also had Jones endorse under the forged endorsement of Keniston. They then presented the draft to Eckermeyer, defendant's teller, who asked several questions to which Smith or Jones answered: That the draft was in settlement of a claim of Keniston's, that Jones was collecting the money for Keniston, that the reason he was doing this was that Keniston did not have a bank account and desired the cash. Eckermeyer checked

the fact that Jones had an account with defendant and made the deposit, telling them that the draft could not be drawn against for five days until it had been collected. Defendant presented the draft through banking channels and the Phoenix Co. paid it. Thereafter, Jones checked out to Smith all but $100. When the forgery was discovered, defendant was promptly notified. Later, the Phoenix Co. settled Keniston's claim for $7,500.

The court first held that the draft was payable to bearer, since Smith did not intend it to be payable to Keniston when he drew it. The court also held (p. 58):

> "The Court is further of the opinion that plaintiff should not recover in this case under the law and upon the facts as shown by the record independently of the defense of 'fictitious payee.'
>
> "The facts in the instant case have heretofore been set out at considerable length. It would serve no useful purpose to repeat them here. It should perhaps be again pointed out, however, that Harry Neal Smith, who actually made out and signed the draft in question was the adjuster and attorney for, and in the handling of the Keniston claim was the agent of, the Phoenix Indemnity Company. That company had trusted him to such extent that it had placed in his hands a book of draft forms and empowered him, as such agent, to draw the draft in question for $6,000 on one of the forms in his possession. The Phoenix Company accepted, from Smith, Keniston's purported but forged release. **Under these circumstances the Phoenix Indemnity Company must be regarded as having first trusted Smith and as having placed in his hands the means and clothed him with the authority which enabled him to commit the wrong. His plan was to defraud his principal, the Phoenix Indemnity Company.**
>
> * * * * * * * * *
>
> "It must be remembered that at that time there was no question as to Mr. Smith's integrity. He was trusted alike by the Phoenix Company and other indemnity and casualty companies and by the bank or banks where he or they transacted business. There is nothing in the record to show that at the time in question he was

known as other than a lawyer in good repute in the community in which he lived and transacted business. Even then, the bank did not pay out the proceeds of the draft at once, but took it for collection and it was not until it had been honored by the Phoenix Company and approximately 7 days after the draft was first presented to Mr. Eckermeyer that the money was drawn by Smith from the Jones Account. **Certainly under such circumstances the well-established rule that 'where one of two innocent persons must suffer by the fraud of a third person, he who first trusted such third person, and placed in his hands the means which enabled him to commit the wrong must bear the loss', is applicable."** (Citations.)

Bartlett, et al. v. *First National Bank of Chicago,* 247 Ill. 490, 93 N. E. 337 (1910):

Action by Bartlett, Frazier & Carrington against the First National Bank to recover the amount of 135 drafts drawn by plaintiffs, by their agent, R. L. Walsh, upon themselves to the order of various persons living near Reddick, during the year 1906, and fraudulently endorsed by Walsh in the names of the payees and paid to Walsh by the State Bank of Reddick, and to said bank by the defendant, and to defendant by plaintiffs. Directed verdict and judgment for defendant. Affirmed on appeal by Appellate Court, and on certificate of importance, plaintiff appealed. Judgment affirmed.

Plaintiffs, buyers of grain, ran an elevator at Reddick in which they employed R. L. Walsh as manager. Walsh bought grain from neighboring farmers and paid by draft of plaintiffs, signed by him as agent, drawn on plaintiffs. The drafts were cashed by the State Bank of Reddick, and by that bank forwarded to defendant bank which collected them from plaintiffs. In 1905 to accommodate the farmers and to meet competition, Walsh would fill out the drafts and, without authority, endorse the farmers' names and put the drafts through for collection. He would pay the farmers in cash so obtained. The banks had no knowledge of

this but plaintiffs must have, because on September 8, 1905, they wrote Walsh criticizing this method of doing business and instructing him to draw on their "currency account" when he desired to pay for grain in cash. Nothing appears in the record that up to this point Walsh was guilty of any dishonesty. In May, 1906 there was a shortage of oats in the Reddick elevator and plaintiffs sent their agent at Kankakee to Reddick to investigate Walsh's business. Apparently no dishonesty was discovered, for on May 29, 1906 plaintiffs wrote Walsh to that effect but again criticized him for endorsing the payees' names to drafts when he paid in cash. No notice of any of these facts was given to the banks concerned.

In November, 1906, plaintiffs discovered that Walsh, by issuing drafts without receiving grain therefor, and endorsing them in the names of the payees and putting them through for collection, had obtained $12,500 in cash, which he converted to his own use.

Plaintiffs contend that the title of defendant bank to the drafts in question is based upon Walsh's forgery of the payees' endorsements and hence the defendant bank had no title and plaintiffs may recover back the amount paid under defendant's guaranty of prior endorsements. The court held that this is the general rule, but in the case at bar the negligence of plaintiffs was so gross that they should not as matter of law be permitted to recover.

The court said (p. 498):

> "**When one of two innocent parties must suffer loss by reason of the wrongful acts of a third party, the rule is almost universal that the party who has made it possible, by reason of his negligence, for the third party to commit the wrong must stand the loss.** In this case, if the appellants had notified the banks who were handling said drafts that R. L. Walsh was forging the names of the farmer payees in order to get the money on the said drafts from the banks, the loss which was sustained by the passing of said drafts would never have occurred. This they did not do, but remained quiet so long as they thought they were getting the

benefit of the money that was paid on said drafts, and only complained when they learned that their agent, Walsh, was taking advantage of the position in which they had placed him by his appointment as their agent, with authority to draw drafts, by drawing drafts to farmers who had not delivered grain, and endorsing the names of such farmer payees upon the drafts and drawing the money from the banks thereon and appropriating the same to his own use. We think it clear if the appellants enjoyed the benefits which accrued to them from the business done by Walsh so long as it was done honestly, that when Walsh became dishonest and appropriated the money which he drew by reason of forged endorsements they should suffer the loss which followed his rascality, and not be permitted to unload such loss upon the banks that innocently handled said drafts." (Emphasis ours.)

Young v. *Gretna Trust & Savings Bank*, 184 La. 872, 168 So. 85 (1936):

Suit by receivers of the Celotex Co. against the bank for money paid on checks bearing forged indorsements. From a judgment dismissing the suit, plaintiffs appeal. Affirmed.

The plaintiff employed an assistant timekeeper who assisted in making up the payroll from the time-cards and distribution sheets and also made up part of the checks, *i.e.*, he put the name and date on the check and sent it to the cashier who filled in the amount. Vanderbrook made up false time cards and punched these with the time clock on Sunday morning. He then had false distribution sheets made up to correspond with the time cards and placed the name of one of the labor-checkers on them. From these false cards and sheets he caused fictitious names to be placed on the pay roll.

After the paymaster paid off, there were always some checks left over and these were taken to the cashier's office. Vanderbrook obtained these, extracted the false ones, wrote the names of the payees on the backs, and cashed them in New Orleans. This practice was continued by Vanderbrook for a period of about five years before it was discovered.

After discussing the general principles applicable to banks paying their depositors' funds out on forged endorsements of fictitious payees, the court said (p. 884):

> "The Gretna Bank cashed the checks in question in the usual, ordinary manner, in good faith, and in due course of business. The evidence shows that none of the checks were cashed at the window of the Gretna Bank, but were all cashed by a Mr. Gerstner and a Mr. Wakefield, handbook operators, who subsequently cashed the checks at the various New Orleans banks, which sent them to the defendant for payment upon their respective endorsements thereof. Plaintiff's checks, after payment and cancellation, were returned to it monthly, together with the statement and notation thereon to please examine at once, and if no errors were reported in ten days, that the account would be considered correct.
>
> **"The fact that plaintiff, through its authorized officers and agents issued to designated parties these checks, which appeared on their face to be regular pay roll checks, justified the defendant in believing that the payees thereof were regular employees of plaintiff and the endorsements thereon genuine. Moreover, the repeated issuance of the checks in the manner herein pointed out from week to week and year to year, and particularly during the last two years when the checks were made payable to the same named twelve employees, was not only sufficient to induce a cautious and careful person to believe and conclude that such checks were issued to plaintiff's bona fide employees and the indorsements thereon were genuine, but would also tend to place the bank in such a position that it could be imposed upon by plaintiff's trusted officer.**
>
> "The record conclusively shows that during the entire period during which the checks were fraudulently issued and cashed through Vanderbrook's manipulations, neither plaintiff's officers nor its employees ever made a single check of its payroll against the men actually employed or against the labor records. Plaintiff's own witnesses testified that had such a check been made, it would have revealed Vanderbrook's fraud.

> **"A well-established rule of equity is applicable here, i. e., that 'where one of two innocent parties must suffer loss through the fraud of another, the burden of the loss should be imposed on him who most contributed to it.'** (Citing cases.)
>
> **"We are of the opinion that under the facts and circumstances of this case the carelessness, negligence, and laches of the plaintiff are the direct and proximate cause of the loss, and, therefore, it is estopped from claiming reimbursement from the Gretna Trust & Savings Bank, in liquidation."** (Emphasis ours.)

Defiance Lumber Co. v. *Bank of California,* 180 Wash. 533, 41 P. (2d) 135, 99 A. L. R. 426 (1935):

Appeal from judgment for defendant in an action to rerecover money paid on checks with forged endorsements. Affirmed (4 judges dissenting).

Plaintiff manufactured lumber, and during the years in question L. L. Doud was president, a Mr. Gange was general superintendent and R. B. Foster was the day foreman of its sawmill and its timekeeper. Plaintiff employed about 250 men and of these about 80 worked under Foster. Prior to November, 1928, plaintiff's main office was located about two blocks from its plant, at which was located a smaller office used by Gange, Foster, and one Swanson, the yard foreman. In this smaller office was a time clock, upon which the workmen were required to register in and out. Adjacent to the clock were racks, in which the men's time cards were kept. The occupants of the office could readily observe the workmen as they checked in and out. It was a rule of the company that no one should punch the clock more often than once in the morning and once in the evening. Each time card bore the name and number of an individual workman.

Beginning in November, 1927, Foster inserted in the rack a time card bearing the name J. C. Bell, a fictitious person, and each two weeks following would make out a new card for him. In July (1928) he added another card bearing the

name George Osborne. He carried these two along until the following April (1929), when he added a third in the name of D. Ferris, and in September, 1929, a fourth in the name of Lee Mitchell. Cards bearing these four fictitious names were continued by Foster until December, 1929, when his fraud was exposed.

Foster sneaked the spurious pay checks from the racks and cashed them at various banks after endorsing the name of the fictitious payees. Of the 113 checks involved, only nine were also endorsed with Foster's own name.

Plaintiff sued defendant as drawee for the money wrongfully paid out on these endorsements, and defendant interpleaded the various banks actually cashing the checks for Foster. The court disposed of the case on the question of defendant drawee's liability to plaintiff.

At page 540 the court said:

> "It is evident that the system used by appellant in keeping the time of its men, preparing its pay roll and distributing the pay checks, was poor, and offered great opportunities for fraud on the part of a dishonest employee. No adequate check was made to ascertain who was actually employed or was working, and the time clock system, as operated, was easily beaten, as the result proved. Appellant issued its regular pay roll checks over a period of years, the payees of which were, in fact, non-existent. It intended that these checks be cashed, supposing that the money had been actually earned by the payees. As the trial court, in its oral opinion, well stated:
>
> " 'To reimburse itself for the loss sustained by its own mistake, it now asks the Bank of California to pay to it the money used in cashing these checks, claiming the Bank should have discovered what the company itself, with all its knowledge of its employees, failed to discover in making up its payroll'.
>
> "It is important to remember that the checks with which we are here concerned were not forgeries. They were admittedly regularly drawn and signed by appellant's agents and officers. There is a clear distinction

between a forged check and the forged endorsement of a check. The obligation of a drawee bank to its depositor is well nigh absolute, in so far as the depositor's signature to a check is concerned. The drawee's liability in connection with the payment of a genuine check, in so far as the matter of any endorsement thereon is concerned, presents entirely different questions.

"The drawer of a check cannot recover from the bank paying the same on a forged endorsement, where the payment was the proximate result of the drawer's own conduct, unless the bank by its negligence has rendered itself liable, in spite of the drawer's negligence. **The rule that a bank which pays a check upon a forged endorsement must stand the loss is limited to instances in which the acts of the depositor have not increased the risk lawfully resting upon the bank. The equitable doctrine that, as between two innocent persons, the one whose act was the cause of the loss should bear the consequences, applies in many cases.**"

The court then discusses numerous cases and concludes (page 548):

"With the findings of the trial court, we are, generally speaking, in accord. **We are clearly of the opinion that appellant, by its careless and negligent conduct of its own business, permitted its own employee to perpetrate upon it a gross fraud, and that it cannot now recoup its losses by passing the burden thereof to respondent.** Appellant set up the machinery which resulted in the loss, itself took into its employ the man who stole its money, continued him for a long period of time in a position of trust and authority, failing to observe, as we view it, the slightest care to see that it was protected against such fraud as was, in fact, perpetrated, either by some reasonable check of its employees, by adequately guarding its time clock or its time cards, or by maintaining an adequate system of accounting by which any such loss as that which occurred would have been avoided." (Emphasis ours.)

Central Trust Co. v. *Eureka-Security Fire & Marine Ins. Co.*, 198 N. E. 62, 50 Ohio App. 308 (1935):

Action by the insurance company against defendant bank to recover the amount paid to defendant in taking up a certain draft dated October 11, 1928, drawn by T. A. Manning & Sons, plaintiff's agent in Dallas, on plaintiff payable to the order of Clarence Brooks. Judgment for plaintiff and defendant appeals. Reversed and judgment rendered for defendant.

Manning & Sons was the general agent of plaintiff; A. C. Cason & Son was plaintiff's local agent in Dallas, and George B. Ford was an agent of that agency. Ernest P. Tally was a salesman in Dallas. Plaintiff issued a policy through A. C. Cason & Son, local agent for plaintiff's general agent, T. A. Manning & Sons, on August 9, 1928, and insured Clarence Brooks upon a certain described automobile. On October 8, 1928, a sworn statement and proof of loss purportedly signed by Brooks were presented to plaintiff. Following investigation, on October 11, 1928, the draft in question was drawn, signed, T. A. Manning & Sons, in the sum of $1200, payable to the order of Brooks. The draft was presented to the bank in Dallas and was endorsed by Clarence Brooks and under that name appears "Mrs. G. L. Maddox". In due course it came to defendant which bank thereupon notified plaintiff. A member of the insurance company called at the bank, inspected the draft, with some others, and issued a blanket check covering several drafts, took up the draft, and retained it up to the time of trial. Tally testified he had endorsed the draft "Clarence Brooks" and Ford had endorsed it, "Mrs. G. L. Maddox". The various collateral papers involved were all forged. Clarence Brooks was fictitious.

The court held: (1) There is no relation of banker and depositor here; the plaintiff was drawee.

At page 64 the court said:

> "The relation did not make the bank a guarantor of the validity of the indorsements. The drawee, after the inspection of this draft, furnished the bank with the funds to pay, and assumed the full responsibility for the indorsements when it paid the draft and retained it.

> The bank was bound to disburse the fund in accordance with its instructions."

The court held: (2) That plaintiff is precluded by laches since it learned of the fraud in the spring of 1929 and gave no notice to defendant until October 25, 1929.

The court further held: (3) at page 64:

> "Moreover, the real issue in this case grows out of the fraud perpetrated on the company by its own agents.
>
> "In the last analysis, to hold in favor of the insurance company in this case would be to hold that the banks, by their endorsement of the draft, insured the principal against fraud perpetrated upon it by its own agents, made possible by the negligence of the principal, the plaintiff in this case."

The court said (p. 65):

> **"It is also a well-settled rule of law that where one of two innocent parties must suffer, through fraud, the loss must fall on the party who made the fraud possible. The plaintiff insurance company was the principal mover in causing the loss, and it may not recover from the other innocent parties; in this case, the banks."** (Emphasis ours.)

United States v. *First National Bank of Prague, Okla.*, 124 F. (2d) 484 (C. C. A., 10th Cir., 1941):

Action by the United States of America against the First National Bank of Prague, Oklahoma, and another on defendants' guaranties of prior endorsements on check. From an adverse judgment, the plaintiff appeals.

Affirmed as to defendant Tradesmens National Bank of Oklahoma City, and as to defendant First National Bank of Prague judgment reversed and cause remanded for further proceedings in accordance with opinion.

Bratton, Circuit Judge (p. 487):

> "But, as between the United States and the bank at Prague, the imposter first established contact with the

bank. The bank became satisfied that he was the veteran and made him a loan, taking the certificate as pledged security. After satisfying the bank in respect to his identity, after negotiating the loan, and after pledging the certificate, when he came to make application to the Administration and was faced with the necessity of establishing his identity to the satisfaction of the Administration, he went to the individual who was both president of the bank and a notary public. That individual signed the certificate appended to the note being given for the loan. He stated in the certificate that he knew the person applying for the loan to be the veteran named in the certificate, and that the signature on the note was that of such veteran. The certificate was made in the capacity of notary public, and the Administration did not have knowledge of the fact that the person making it was also president of the bank. But in addition to making the certificate for the intended purpose of giving assurance to the Administration that the applicant was the veteran, the bank released the certificate then held as collateral in order that it might be deposited with the Administration as security for the loan being sought; the certificate was attached to the note; and together the two were submitted to the Administration."

The court said (p. 488):

"* * * Thus the issuance and mailing of the check to the imposter was not the first act which made possible the loss. On the contrary, by first reposing confidence in him and by cooperating with him as indicated, the bank unwittingly contributed to the deception of the Administration in respect to the vital matter of identity; and such cooperation constituted the initial act which resulted in the imposter fraudulently obtaining money to which he was not entitled. **The acts and conduct of the bank, without being so intended, facilitated the fraud and primarily made possible the loss. Stated otherwise, the bank unwittingly cooperated with the imposter in setting in motion the train of events which culminated in the loss. As to the liability of that bank on its endorsement, these facts and circumstances take the case out of the general fraudulent impersonation doctrine previously reviewed, and make applicable the well established rule that as between two innocent persons, both of whom are victims of fraud, the burden**

must fall upon the one whose negligence first facilitated and made possible the loss." (Emphasis ours.)

Royal Indemnity Co. v. *Federal Reserve Bank of Cleveland,* 38 F. Supp. 621 (D. C., S. D. Ohio, W. D., 1939, affirmed 119 F. (2d) 778, 1941):

Action by the Royal Indemnity Company against the Federal Reserve Bank of Cleveland, Cincinnati Branch, to recover the amount of checks on which the names of payees had been forged and on which defendant had stamped, "All prior endorsements guaranteed". Judgment for defendant.

Druffel, District Judge (p. 623):

"(2) The Union Central Life Insurance Company, by its failure to detect the forged signature on the loan applications and by its continued failure to compare the signatures of the payee on the checks with the genuine signatures in its possession, as shown by the evidence, was solely and wholly responsible for the loss, and leaves this court no alternative but to **apply the well-established rule that where one of two innocent persons must suffer loss by the fraud or misconduct of a third person, the one who first reposes the confidence and commits the first oversight, must bear the loss, and plaintiff is estopped from demanding payment herein."** (Emphasis ours.)

Carusi v. *Savary,* 6 App. D. C. 330 (1895):

Hearing on an appeal by the defendant from a decree vacating and annulling two deeds to real estate. Reversed.

Savary and Williams entered into a written agreement whereby it was agreed that Savary would sell to Williams certain real estate upon certain recited consideration. The deed executed by Savary, with certain other papers, was placed in a safe deposit box obtained in the joint names of the parties. Williams surreptitiously abstracted the deed from the safe deposit box, executed a deed of trust and secured a loan on the security of the property from a third person. Savary filed bill of complaint in equity to cancel

the deed executed by him to Williams and the deed of trust executed by Williams to the third party making the loan on the security of the real estate.

Speaking for the court Mr. Justice Morris said (p. 344):

> "The question in this case, as we understand it, is which of two innocent persons should be required to suffer the loss occasioned by the wrongful act of a third person, the one who, by his negligence or inadvertence, has placed it in the power of such third person to perpetrate the wrong which otherwise would not have been perpetrated, or the one who, without any negligence on his own part, has been misled by the wrongdoer into a situation into which otherwise he would not have entered. And in the light of modern equity, of the overwhelming mass of modern judicial decision, and of what seems to us to be the dictate of natural justice, that question, in our opinion, can admit of but one answer."

Page 345:

> "Without denial of the rule that no deed of conveyance is complete until it is, not only executed, but actually, freely and voluntarily delivered, it is a paramount principle of equity that, when situations have been created by the action, inaction or negligence of parties, they should not be permitted to take advantage of them to the detriment of those innocent persons who have been, without negligence of their own, led to act upon such situations."

Page 347:

> **"That there was a great fraud perpetrated upon the complainant, is of course quite evident. But he was the victim of his own misplaced confidence, for which it is not just that he should make others suffer, who are wholly innocent."** (Emphasis ours.)

Upon the authority of the foregoing well considered decisions, we maintain that the equitable doctrine of estoppel, presented by the seventh defense of the defendants, is applicable to the facts stated in the opening statements of

counsel for the defendants, and that it was error for the court below to direct the jury to render verdicts for the plaintiff.

C.

ANALYSIS OF OPINION OF COURT BELOW DEMONSTRATES THAT COURT ERRED IN HOLDING THAT EQUITABLE PRINCIPLE OF ESTOPPEL IS NOT APPLICABLE TO FACTS HERE PRESENTED.

In holding that the principle and doctrine of equitable estoppel pleaded in the seventh defense of the defendants is not applicable to the facts stated in the opening statements of counsel for defendants, the court below, in the course of the oral opinion, said (Appellants' App. 54-57):

> "Now, as to the question of equitable estoppel, I think I have read all the cases which were cited on this subject in the brief of defendants and after careful consideration of them, I am of the opinion that this is not a case in which the rule applies.
>
> "The checks here involved were not payable to Stitely, they were delivered to him for the purpose of delivery to the payees; they could not be used by him in their condition, but forgery of the names of the payees was necessary. Now, many of the cited cases, the cases cited by the defendants, I think can be distinguished on satisfactory grounds, though it is true that in many cases, the decision was in part based on equitable estoppel, and thus support the contention of defendants.
>
> "It seems to me that the language used in National Safe Deposit Company v. Hibbs, 229 U. S. 391, 396, shows the extent of the rule. All of you gentlemen are familiar with the facts in that case." (The court below then quoted portion of the opinion, Appellants' App. 55).

Continuing the court below said:

> **"Now, it seems to me the distinction is that there, when the dishonest employee got the stock certificates, there was nothing else for him to do, that is, there was no way of checking up—he apparently had the title and he did not forge anything.**

"In this case there was this other act and it seems to me that the line has been drawn there.

"In the present case, Stitely got possession of the checks not payable to bearer. However, forgery was necessary to permit him to avail himself of the proceeds; first, the actual forgery was necessary and then an implied false representation to each bank which cashed the check was necessary.

"I think the facts of the present case do not bring it within this rule as announced by the Supreme Court. (Emphasis ours.)

"Now, in many of these cases relied on, and which are applicable, to some extent, the defense of negligence, there were other grounds on which the decision could be predicated, but it is true that in many of these cases, the court relied upon this defense alone, or a combination of the two grounds. I think in some it is put squarely on this one ground of equitable estoppel.

"Now, in many of those cases the checks were payable to bearer; in some cases the imposter rule was applicable; in some cases the wrongdoers were agents with authority to draw instruments which would bind their principals and they exceeded that authority. In others, the relation of bank and depositor existed, and the depositor failed to discover the forgeries within a reasonable time. In other cases, while the relation of depositor and bank may not have existed formally, nevertheless, the bank had some very definite business relation with plaintiff, and was being used by plaintiff in the performance of its business.

"The case cited by defendants which is more like this than any of the others is United States v. Commercial National Bank, Law No. 77050 in the Supreme Court of the District of Columbia, decided by Justice Bailey. It is contended by plaintiff and I think with some force, that as to all but one check, that decision might have been grounded upon the imposter theory. However, Justice Bailey put his decision squarely on the ground of equitable estoppel and did not mention the other ground.

> "Counsel for defendants have called attention to the respect to which a decision by Justice Bailey is entitled. I realize that just as strongly as they do, perhaps better than they. I am acquainted with his great learning, his ability, sound judgment, and his infinite care in making a decision, and it is with great hesitation that I have found myself unable to agree with his view in that case."

It will thus be seen that the court below, in ruling that the equitable principle of estoppel is not applicable to the facts here presented, based its decision on the ground that although Stitely was entrusted with the checks made payable to the named payees, yet it was necessary that he forge the names of the payees in order to avail himself of the proceeds of the checks and this being the case the equitable principle did not apply. The court below cited and quoted from the opinion of the Supreme Court in the case of *National Safe Deposit Co. v. Hibbs,* 229 U. S. 391, 396, and held, that case "shows the extent of the rule". (Appellants' App. 55).

While it is true that in *National Safe Deposit Co.* v. *Hibbs, supra,* the certificates of stock had been endorsed in blank, thus "containing all the indicia of ownership and possible of ready transfer", and in the case here presented it was necessary for Stitely to forge the names of the payees on the checks, nevertheless, we maintain that the equitable principle announced in the case cited is likewise applicable here.

The fact that in *National Safe Deposit Co.* v. *Hibbs, supra,* it was not necessary for the dishonest employee to forge the certificates of stock, and here it was necessary for Stitely to forge the names of the payees in the checks, does not make the equitable principle inapplicable here, nor does it support or even lend color to the distinction sought to be drawn by the court below.

An examination of the opinion of the Supreme Court in the case cited will make it obvious that there is not any-

thing stated by the court which in anywise supports the line of demarcation sought to be drawn by the court below. Nor is there anything stated in that opinion which justifies the refusal of the court below to apply the equitable principle of estoppel to the facts here presented.

On the contrary, by the overwhelming weight of authority, as exemplified by the cases cited and relied upon by appellants, the equitable principle of estoppel is applicable to, and was applied in, cases similar to the case here presented, in which it was necessary for the wrongdoer to forge the names of the payees in the checks in order to avail himself of the proceeds thereof.

In the cases cited and relied upon by appellants the court made no distinction such as that sought to be made by the court below. In each of the cases cited and relied upon by appellants (except *Savary* v. *Carusi, supra*), it appears that the names of the payees in the checks and drafts were forged by the wrongdoer, yet the court applied the equitable principle and doctrine here contended for.

Upon the facts here stated, it was the negligence and fault of the government which provided the means and put it in the power of the dishonest employee, Stitely, to perpetrate the fraud, and the fact that it was necessary for him to forge the names of the payees in the checks in order to avail himself of the proceeds thereof, does not make inapplicable the equitable principle contended for by appellants.

It was the continued negligence of the government which provided the means and put it in the power of Stitely to forge the checks and perpetrate the fraud, by reason of such continued negligence the loss is directly attributable to the fault of the government, and the equitable principle of estoppel is applicable, even though the names of the payees in the checks were forged by Stitely.

In the endeavor to distinguish the cases cited and relied upon by appellants from the facts stated by the defendants below in the opening statements, the court below said:

> "* * * Now, many of the cited cases, the cases cited by the defendants, I think can be distinguished on satis-

factory grounds, though it is true that in many cases, the decision was in part based on equitable estoppel, and thus support the contention of defendants." (Appellants' App. 55.)

"Now, in many of these cases relied on, and which are applicable, to some extent, the defense of negligence, there were other grounds on which the decision could be predicated, but it is true that in many of these cases, the court relied upon this defense alone, or a combination of the two grounds. I think in some it is put squarely on this one ground of equitable estoppel.

"Now, in many of those cases the checks were payable to bearer; in some cases the imposter rule was applicable; in some cases the wrongdoers were agents with authority to draw instruments which would bind their principals and they exceeded that authority. In others, the relation of bank and depositor existed, and the depositor failed to discover the forgeries within a reasonable time. In other cases, while the relation of depositor and bank may not have existed formally, nevertheless, the bank had some very definite business relation with plaintiff, and was being used by plaintiff in the performance of its business." (Appellants' App. 56.)

Nowhere in the opinion of the court below does there appear any "satisfactory grounds" for distinguishing the cases cited and relied upon by appellants from the facts here presented.

We maintain that none of the distinctions mentioned by the court below distinguish the cases cited and relied upon by appellants from the facts here presented.

The fact (a) that the checks may have been payable to bearer, (b) that the imposter rule may have been applicable, (c) that the agents may have exceeded their authority, (d) that the relation of bank and depositor, or (e) some other business relation, may have existed between the parties, as pointed out by the court below, yet none of these premises in anywise distinguish the cases cited and relied upon by appellants from the instant case.

Although the court, in the cases cited and relied upon by appellants, may have rested its judgment in part upon any one or more of the foregoing premises, yet such circumstance does not, and should not, affect the weight to be accorded the decision, because the court there applied the equitable principle here contended for in cases in which it was necessary for the wrongdoer to forge the names of the payees in the checks in order to obtain the proceeds of the checks or drafts.

After having considered all of the so-called distinguishing characteristics above enumerated by the court below, the fact remains that in the cases cited and relied upon by appellants it was held that the equitable principle here contended for by appellants is applicable where the negligence and fault of the plaintiff put it within the power of the wrongdoer to perpetrate the fraud, notwithstanding the fact that it was necessary for the wrongdoer to forge the names of the payees in the checks in order to avail himself of the proceeds thereof.

Upon the authority of the cases relied upon by appellants, we maintain that notwithstanding the fact that it may have been necessary for the wrongdoer to forge the names of the payees in the checks, nevertheless, the equitable principle here contended for is applicable, and the government should not be permitted to shift the burden of the loss to the other innocent party.

In concluding the argument under this heading, we maintain that upon the overwhelming weight of authority, the equitable principle and doctrine of estoppel presented in the seventh defense of the defendants is applicable to the facts stated in the opening statements of counsel for defendants below; that the court erred in holding that such equitable principle is not applicable to said facts, and in instructing the jury to render verdicts for plaintiff below.

II.

The government was guilty of negligence in the issuance of the checks sued on, in that it failed to keep proper books and failed to balance and reconcile its books, and such negligence of the government was the proximate cause of the loss for which recovery is sought.

The defense of negligence of the government in the issuance of the checks sued on is presented by the fifth and sixth defenses of the defendants below. (Appellants' App. 7-8.)

In an earlier part of this brief we pointed out that the several actions of the government against the banks are in the nature of equitable actions, and the right to recover is governed by equitable principles. That argument is likewise applicable to the defense of negligence here being discussed, and we request that it be considered by the court in determining the question here presented, without the necessity of repeating the argument.

The facts stated in the opening statements show that from the issuance of the first check, dated November 4, 1932, to the issuance of the last check, dated March 25, 1937, the government negligently failed to keep proper books, failed to balance or reconcile its books, and failed to obtain the necessary information to enable it to balance or reconcile its books in order to detect the fraud which was perpetrated upon the government by its dishonest employee, Stitely, continuously over a period of more than four years.

In the War Department, and in the National Park Service they had inspectors whose duty it was to inspect the C. C. C. camps, but none of the inspectors of either service ever discovered that this camp for which Stitely was making up the fraudulent pay rolls was only an imaginary camp. (Appellants' App. 37.)

Stitely knew that the National Park Service did not keep proper books, and that they could not balance their books. If proper books had been kept, Stitely's defalcations could have been discovered at the inception, and thereby the loss

for which recovery is sought could have been prevented by the government. (Appellants' App. 39-40.)

By reason of the negligence of the government, Stitely was permitted to set up an imaginary C. C. C. camp in the Shenandoah National Park in Virginia, and continuously from July 15, 1933, to the end of March, 1937, to make up fraudulent pay roll vouchers containing the names of some nine fictitious persons, presumably civilian employees in the imaginary C. C. C. camp, and each pay day (twice monthly) to obtain checks of the government, presumably in payment of the fraudulent pay rolls.

The facts stated in the opening statements show that the government was guilty of gross negligence, and such negligence was the proximate cause of the loss for which recovery is sought against the banks.

We maintain that the primary cause of the loss for which recovery is sought was the negligence of the government in the issuance of the checks; that because of the fact that such negligence of the government permitted the continued issuance of the checks over a period of more than four years, such negligence of the government was so linked with and bound to the act of Stitely in forging the names of the payees in the checks as to create and become a continuous whole, such negligence of the government so efficiently operating with the act of Stitely in the forging of the names of the payees in the checks as to make it the concurring and proximate cause of the loss.

By reason of said negligence of the government in the issuance of the checks, the banks believed, and had every reason to believe, that when Stitely presented the checks either for deposit or to be cashed, he had the right to so present the checks.

The checks sued on were spurious and had no valid existence from the time of issuance, and the government owed the banks the duty of exercising reasonable care so as to prevent the issuance of such spurious and invalid checks.

In considering the questions relating to the negligence

of the government in the issuance of the checks, we should keep in mind that there is not here involved an isolated transaction, but that the causes of action of the government involve numerous transactions covering a period of more than four years.

In these three causes of action there are involved 1072 checks, aggregating $81,801.72. (Appellants' App. 29.)

The facts here under consideration present an entirely different situation from that involving only an isolated transaction.

By reason of the continued negligence of the government, the banks were misled to believe, and did believe, that the checks were valid and the endorsements thereon were genuine. It was the duty of the government, in the exercise of reasonable care, to take all necessary precautions in the conduct of its business so as to prevent the continued fraud in the issuance of the checks.

Moreover, the President of the United States, in an address to the banks, made on September 28, 1935, called upon the banks to cooperate with the government in the cashing of the checks. This imposed upon the government a greater duty of exercising reasonable care in the issuance of the checks so as to prevent the continued perpetration of the fraud by Stitely, and the failure to exercise such reasonable care constituted a breach of the duty which the government owed to the banks.

The facts stated in the opening statements reveal that Stitely regularly presented for deposit, or to be cashed, government pay roll checks on each pay day, covering a period of more than four years. It had been the usual practice of the bank over a period of many years to receive for deposit or to cash other government pay roll checks presented by other employees of the government on pay days. Under the circumstances disclosed by the facts here presented, it is obvious that the banks, in accepting the checks had the right to rely, and did rely, upon the performance by the government of its duty to exercise reasonable care so as to prevent fraud in the issuance of the checks.

The following cases support the position of appellants that the government was negligent in the issuance of the checks, and such negligence was the proximate cause of the loss for which recovery is sought:

Kaszab v. *Greenebaum Sons Bank & Trust Co.*, 252 Ill. App. 107 (1929):

Plaintiff was a depositor in defendant bank and sues to recover $26,700 paid by defendant on 468 checks drawn by plaintiff over a 19-months period. Plaintiff alleges these checks were paid out on forged endorsements of the payees named therein. Defendant pleaded the general issues and also filed 8 affidavits of merit, among them one to the effect: first, plaintiff was negligent in his method of business in allowing the checks to be issued; second, that defendant rendered bi-monthly statements with the return of the checks, and this constituted an account stated; third, that plaintiff was negligent in failing to discover the forgeries from the returned checks. All of these defenses were, on motion, stricken. At the trial all evidence of plaintiff's negligence, sought to be introduced by defendant, was excluded by the court on the ground that it did not constitute a defense. From a judgment on directed verdict for plaintiff, defendant appeals. Reversed and remanded.

It appears from the testimony that plaintiff hired between 70 and 100 workmen. His bookkeeper, Gertz, made up the pay roll from the time cards. These time cards were kept by one, Tomasek, who had sole charge of them. They showed the number of hours' work done by each employe and the amount each was to receive. After the checks were prepared they were signed by plaintiff and the time cards were returned to Tomasek. After they were signed they were put through a machine which stamped the amount in dollars and cents on the check corresponding to the pen and ink figures made by Gertz. After the checks were made out they were entered upon a check register, and after they were returned by the bank they were compared with the

bank's statement. The first check bearing an alleged forged endorsement was issued in March, 1925, and the last in October, 1926. Plaintiff kept the checks in his drawer until they were distributed. All of the checks were cashed at other banks and paid by defendant through the clearing house. Plaintiff's employees were hired by him and he knew a number of them personally. Each month the bank returned all checks paid along with a statement, on which was a direction to correct all errors before the 15th of the following month, or no claim could be made against the bank.

At page 211 the court said:

> "**We are of the opinion from an examination of the record that there is evidence upon which the question of negligence should have been submitted to the jury. The fact that the bank furnished monthly statements to the plaintiff; that the employee Tomasek was able to continue the forging of endorsements for a period of 19 months; that the checks were signed by the plaintiff with the name of the payee thereon, during that period of time, is evidence sufficient to take the case to the jury.** Any check-up of overhead expense would have shown the unusual cost. Moreover, defendant was precluded from presenting this issue to the jury and, as a result, may have been unable to present other facts bearing on the question of plaintiff's exercise of due care. A review of the authorities cited by plaintiff discloses that many of the cases cited are of and concerning isolated transactions and, in some cases, involving a relationship other than that of bank and depositor. The rule is too well settled in this State, and we believe generally, to require the citation of numerous authorities." (Emphasis ours.)

Prudential Insurance Co. v. *National Bank of Commerce,* 227 N. Y. 510, 125 N. E. 824 (1920):

In this case plaintiff, a life insurance company, sued the bank to recover money paid on certain checks drawn by plaintiff on defendant bank, it being alleged that an agent of plaintiff had forged the names of the payees and con-

verted the proceeds thereof to his own use. The trial court directed a verdict for plaintiff, and judgment thereon was affirmed by the appellate division. Upon appeal, the Court of Appeals reversed the judgment.

The court said (p. 522):

> "We think in this case that it was at least a question of fact upon the evidence before the court, a brief statement of which we have given, whether the plaintiff was negligent in failing to examine the endorsements on the checks which had been returned to it by the defendant and other banks with the genuine signatures of the payees in its possession prior to the payment of the Phipps and Wade checks and whether such negligence and the consequent failure of the plaintiff to notify the defendant of the information that it would have obtained by such examination contributed to the payment of said checks by the defendant bank.
>
> **"It is permitted to a bank to escape liability for repayment of amount paid out on forged checks by establishing that the depositor has been guilty of negligence which contributed to such payment and that it has been free from any negligence.** (Citations.)
>
> "We think it was also a question of fact whether the plaintiff after it knew or should have known that Eaton had forged the endorsement on the Cuzner check was negligent in failing to notify the defendant of such facts and the consequent danger of paying other checks sent by the plaintiff to its Portland office without special information and knowledge in regard to the genuineness of the payee's endorsements thereon." (Emphasis ours.)

Pannonia Building & Loan Association v. *West Side Trust Co.*, 93 N. J. Law 377, 108 Atl. 240 (1919):

In this case the building association sued the bank to recover $3141.12, paid by the bank on 32 checks drawn by the building association and paid by the bank, it being alleged that the endorsements of the named payees had been forged. Judgment below for defendant, and the plaintiff appealed. Judgment affirmed.

After reviewing the facts and discussing the law, the court said (p. 384):

> "The principles enunciated in these cases applied to the facts above enumerated, make it perfectly obvious that the plaintiff loan association was negligent in not examining its bank pass book when balanced and the vouchers returned therewith, which included the forged checks in question; for, had it done so by any one or more of its officers, other than Szedlak, it would have discovered that all of these thirty-two checks had been ultimately paid to its treasurer individually, which fact alone would have put it upon inquiry which would have led unerringly to the detecting of the fraud and this in the earliest stages of its perpetration."

North British and Mercantile Insurance Co. v. *Merchants National Bank,* 146 N. Y. S. 720, 161 App. Div. 341 (1914):

In this case plaintiff, insurance company, sued the bank to recover money paid by the bank on checks drawn by plaintiff, it being alleged that the checks were improperly paid by defendant bank, because the endorsements of the payees named in said checks were forged. The case involved 362 checks, covering a period from August 1, 1907, to September 15, 1910. From the facts in the case it appears that two dishonest employees of plaintiff, by presenting fictitious vouchers, procured plaintiff to draw and sign the checks. In some cases the names of the payees were existing persons, either customers of plaintiff (but to whom plaintiff owed nothing), or creditors of one of the dishonest employees. In the other checks, the payees named were non-existent or fictitious persons. The endorsements were forged by the dishonest employees, and they converted to their own use the proceeds of the checks.

In the court below a verdict was directed for plaintiff at the close of all the evidence. Upon appeal by defendant, the judgment was reversed, and the cause remanded for a new trial. After reviewing the facts of the case, and the law applicable thereto, the court said (p. 723):

"Under such circumstances, I am of the opinion that a question was presented which should have been submitted to the jury, whether the plaintiff ought to recover upon any of the checks. The relation between a depositor and a bank is well understood. It is that of debtor and creditor. By reason of this relation a reciprocal duty is imposed".

In speaking of the duty of the plaintiff, the court said (p. 723):

"It therefore owed a duty not only to the defendant, but, I think, to the public generally, to exercise at least reasonable care that the checks which it signed were genuine and not fictitious transactions. If it failed to do this, then it ought not to be permitted to assert their invalidity against either the bank upon which they were drawn or any one else taking them in good faith and for value. When the first fictitious check was returned, and it is not sought here to recover on that one, if an examination had been made such as ordinary prudence would have seemed to dictate, Bradford's dishonesty would have been disclosed and measures could have been taken which would thereafter have prevented similar transactions either by him or Walker". (Emphasis ours)

City of Indianapolis v. *National City Bank,* 80 Ind. App. 677, 141 N. E. 249 (1923):

This was an action by the city against the defendant bank, its depository, to recover money paid out upon warrants with forged endorsements. Verdict and judgment for defendant. Plaintiff appeals. Judgment affirmed.

From the facts of the case it appears that an employee in the street cleaning department of the city prepared and presented to the Board of Public Works false pay rolls naming fictitious and non-existent persons, and thereby procured the issuance by the city treasurer of warrants drawn on the bank in the names of such fictitious and non-existent persons. The endorsements of the payees were forged by an employee of the street department, presented to and paid by the bank, and charged to the account of the city. After

the opinion of the appellate court had been rendered, the city filed a petition for rehearing, which was denied. In disposing of the petition for rehearing, the court said (p. 250):

> "If the drawee pays a check to a holder by endorsement and it develops that the purported endorsement of the payee is in truth a forgery, the bank ordinarily may not have credit therefor against the account of its depositor; **but, in that case, the depositor must have exercised due diligence in the matter of examining his cancelled checks and in giving the bank timely notice of the forgery, or he cannot recover from the bank.**" (Emphasis ours.)

Osborn, et al. v. *Corn Exchange National Bank,* 218 Ill. App. 28 (1920):

In this case plaintiff, insurance company, sued the bank to recover moneys paid on checks drawn by plaintiff on defendant bank. It appears from the facts that an employee of plaintiff procured the signing of the checks by the officers of plaintiff, forged the endorsement of the payees, cashed the checks and converted the proceeds thereof to his own use. The case involved about 200 checks, covering the period from July 18, 1911, to January, 1915, aggregating $19,212.25. In the court below there was judgment for defendant, which was affirmed on appeal. In affirming the judgment, the court said (p. 34):

> "The question for our solution is: Will the law saddle the loss in this case upon defendant, who was guiltless of negligence in the challenged transactions, or compel the plaintiffs, whose negligent conduct gave their bookkeeper, DeLisle, unrestrained opportunity to commit the forgeries complained of? It cannot be gainsaid that defendant furnished plaintiffs every opportunity during all the time covered by the forgeries to discover and arrest them, by rendering to plaintiffs monthly statements of the condition of their bank account, returning each time all vouchers, including the checks which bore the forged endorsement.
>
> "We are of the opinion that the negligence of plaintiffs attributable to their conduct as above recited is an effectual barrier to recovery in this action."

C. E. Erickson Co. v. *Iowa National Bank,* 211 Iowa 495, 230 N. W. 342 (1930):

This was an action by a depositor against the drawee bank to recover money paid by the bank on certain checks, the endorsements of which were forged. At the close of the evidence the court below directed a verdict for plaintiff, and judgment was entered thereon. On appeal by the defendant, **the judgment of the lower court was reversed.**

From the facts it appears that plaintiff was engaged in the manufacture of novelties in Des Moines, Iowa, and had a payroll of from 119 to 150 employees. The checks involved purported on their face to be pay roll checks. The payees named in the checks were fictitious persons, whose names had fraudulently been added to the pay rolls of plaintiff by one of its officers. The court reviewed at length the facts relating to the method adopted by plaintiff in the conduct of its business, the system put into effect by it relating to pay rolls, and the scheme by which the fraud was perpetrated upon plaintiff. It appears that 72 pay rolls were involved, and 479 checks were claimed by plaintiff to have been forged.

At page 501 the court said:

> "These checks were spurious from the beginning. They never had a valid existence. The name of the payee was fictitious. This was a violation of the system. Its fictitious character could readily have been discovered in the corporation's office by reference to the cards. In signing these checks and delivering them to Cordaro for distribution to the payees and for presentation to the drawee, Bridges represented to the drawee-bank that they were actual pay-roll checks, and that the payees named therein were actual present employees of the corporation."

Again, the court said (p. 502):

> **"If the drawee-bank, in paying the check, reasonably believed that the payee was a present employee, it might also reasonably believe that the endorsement was genuine. In such event, the plaintiff would be chargeable with negligence in inducing the belief."**

At page 506 the court said:

> "We are of opinion that the very system under which plaintiff was operating, and pursuant to which the defendant was cooperating, imposed upon the plaintiff a reciprocal obligation not otherwise implied in the law. This was to obey the requirements of its own system, upon which it had impliedly invited the drawee-bank to rely. The system itself was theoretically perfect for its purpose, and a prudent banker might be justified in putting great reliance thereon. The persistent and long-continued failure of the plaintiff to observe the requirements of the system was apparently the efficient cause of the resulting loss. If a jury should so find, the resulting loss should be allotted accordingly." (Emphasis ours)

In the instant case the court below held that the negligence of the government in the issuance of the checks was not the proximate, but the remote cause of the loss for which recovery is sought. In the course of the oral opinion the court below said:

> "Now, to take up the question of negligence, it seems to me that the real question is whether the alleged negligence was the proximate cause or the remote cause of the payment by the banks on the forged endorsements. There is a decided conflict of authority on this question, but it seems to me that the weight of authority holds that negligence which permits the issuance of a check which is not payable to bearer is a remote cause and not the proximate cause. This rule, as I understand it, has been adopted by the United States Court of Appeals for this District in Nat. Met. Bank v. Realty Appraisal and Title Company, 60 App. D. C., 88 (47 F. (2d) 982), and in the other Federal Courts, and is binding on this court." (Appellants' App. 51-52.)

In *National Metropolitan Bank* v. *Realty Appraisal & Title Co.*, 60 App. D. C. 86, 47 F. (2d) 982 (1931), one Flanagan caused an ignorant woman, one Stevenson, to impersonate one Emelia Murray in the execution of instru-

ments of conveyance in connection with the obtaining of a mortgage loan on the security of real estate of said Emelia Murray. The title company was a depositor in the defendant bank. In closing the transaction, the title company drew two checks on the defendant, payable to the order of Emelia Murray. The checks were delivered by the title company to Flanagan for delivery by him to Emelia Murray. Flanagan fraudulently endorsed the checks with the name of Emelia Murray, also endorsed his own name on the checks, deposited the checks in other banks by which they were endorsed, and presented to defendant which paid the checks, and charged the amount thereof to the account of the title company. The Municipal Court entered judgment for the title company, which was affirmed by this court.

Speaking for the court, Martin, C. J., said (p. 88):

> "It is contended on behalf of the bank that the title company was negligent in permitting Flanagan and his dupe to impose upon the company as shown by the facts, and that this negligence resulted in the issuing of the checks in question, and placed it in the power of Flanagan to obtain payment of them by means of the forged endorsements. It is claimed accordingly that the company is not entitled to recover because of their payment.
>
> "This claim is not tenable. It is doubtless true that the transactions out of which the checks issued were handled in a negligent manner by the officers of the title company. But such negligence bore no relation to the conduct of the bank when it paid the forged checks. When the checks were persented to the bank by Flanagan, so far as the bank was concerned, they were not affected by the previous history of the transaction, but were simply checks drawn by the title company to the order of Emelia Murray and indorsed with her name and that of Flanagan. The bank apparently accepted and paid them upon the faith which it had in its depositor Flanagan, and made no inquiry concerning the genuineness of the prior indorsement thereon of Emelia Murray's name. In this the paying bank was itself negligent, and it was this negligence which led to the present loss and imposes liability for it upon the bank."

The case of *National Metropolitan Bank* v. *Realty Appraisal & Title Co., supra,* involved only one transaction relating to the closing of a real estate loan in connection with which two checks were issued by the title company.

In the case here presented, as we have already pointed out, numerous transactions were involved, extending over a period of more than four years. The facts here presented are readily distinguishable from the facts in the case cited.

We maintain that here, because of the peculiar facts of the instant case, the government owed to the banks the duty of exercising reasonable care in the issuance of the checks and the banks had the right to rely, and did rely, upon the performance of such duty by the government, and the negligence of the government was the proximate cause of the loss for which recovery is sought.

We contend that because the facts in *National Metropolitan Bank* v. *Realty Appraisal & Title Co., supra,* are so entirely different from the facts here presented, that the decision of this court in the case cited is not controlling, but that the cases cited and relied upon by appellants state the true rule applicable to the instant case.

In *National Metropolitan Bank* v. *Realty Appraisal & Title Co., supra,* the court said:

> "* * * When the checks were presented to the bank by Flanagan, so far as the bank was concerned, they **were not affected by the previous history of the transaction,** but were simply checks drawn by the title company to the order of Emelia Murray and indorsed with her name and that of Flanagan." * * * (Emphasis ours.)

On the contrary, in the case here presented, the checks sued on were **"effected by the previous history of the transaction"** in the issuance of the checks, for the reason that the government negligently permitted the checks to be issued over a period of more than four years, that the banks had a right to rely, and did rely, upon the performance by the government of its duty to exercise reasonable care in

the issuance of the checks, and it was the failure of the government to exercise such reasonable care which resulted in the loss for which recovery is sought.

Upon the facts here presented, we have a succession of events occurring in natural sequence, culminating in the loss for which recovery is sought.

The facts here presented show that the government failed to keep proper books, and failed to balance or reconcile its books. Stitely knew that the government did not keep proper books so as to detect the fraud, and the negligence of the government enabled Stitely to continue the perpetration of the fraud, without detection, over such a long period of time. This being the case, the negligence of the government is one of the events joined in natural sequence with the act of Stitely in causing the loss complained of. Without the continued negligence of the government, Stitely could not have perpetrated the fraud in continuing to forge the names of the payees in the checks. The act of Stitely in forging the names of the payees in the checks was not an intervening act, operating independently of the negligence of the government, but on the contrary, such act operated jointly with the negligence of the government in the issuance of the checks, and consequently the negligence of the government was the concurring and proximate cause of the loss complained of.

In *Lanasa Fruit S. S. & I. Co.* v. *Universal Ins. Co.*, 302 U. S. 556 (1938), Mr. Chief Justice Hughes, in discussing the question of proximate cause, said (p. 562):

> "The subject was discussed in an illuminating way by Lord Shaw in his judgment in Leyland Shipping Co. v. Norwich Union F. Ins. Soc. (1918) A. C. 350, 368-371—H. L. He said:
>
> " 'To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure

is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

"'What does "proximate" here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.'"

Upon the authority of the foregoing cases cited and relied upon by appellants, we maintain that the court below erred in holding that the negligence of the government in the issuance of the checks was not the proximate cause of the loss for which recovery is sought, and in directing the jury to return verdicts for plaintiff.

III.

In the issuance of the checks sued on in these causes of action, the government was not acting in its sovereign capacity, but had become a party to commercial paper, and as such was subject to the equitable principle and doctrine of laches.

We maintain that in the issuance of the checks sued on in these causes of action, the government was not acting in its sovereign capacity, but had become a party to commercial paper, as such had abandoned its character as sovereign, and had subjected itself to all of the responsibilites of a private litigant in like position. In these several causes of action the government is asserting a pecuniary demand

against the banks. The right of action of the government against the banks is for the recovery of money paid upon the forged endorsements of the payees named in the checks sued on. In such case, the right of the government to recover is to be determined by equitable principles applicable to private litigants in like situation. The right of the government to recover, being governed by equitable principles, the equitable principle of laches is applicable to the government the same as it would be applicable to private litigants generally in like situation.

When the government comes into court asserting a pecuniary demand, in an action in which the right to recover is governed by equitable principles, its claim for relief appeals to the conscience of the court with the same force—no greater or less than that of a private litigant in like circumstances, and it is the duty of the court to withhold relief, except upon terms which do justice to the defendant against whom the claim is asserted by the government, as determined by the applicable equitable principles.

Any right of action the government may have by reason of the presentation and payment of the checks sued on, such right of action accrued upon the payment of each of said checks.

The facts stated in the opening statement show that the first check sued on bears date November 4, 1932, and the last check bears date March 25, 1937. The complaint of plaintiff was filed in the court below on January 5, 1939. (Appellants' App. 2.)

A computation based upon the checks sued on in the case against The Washington Loan and Trust Company shows that checks aggregating $12,695.39 were presented for payment to, and paid by, the Treasurer of the United States more than three years prior to January 5, 1939 (date of the filing of the suit), and in the case against The Columbia National Bank, checks aggregating $26,546.97 were likewise presented and paid.

In the course of the oral opinion the court below said:

> "In the second place, in my opinion, the statute of limitations is not applicable. Section 1268 of the code provides that the statute of limitations shall not apply to any case in which the United States is the real and not merely the nominal plaintiff. I think this also disposes of the question of laches, speaking now of the equitable defense of laches as comparable to the statute of limitation." (Appellants' App. 49.)

We maintain that the court below erred in refusing to rule that in dealing with commercial paper the government is subject to the equitable principle and doctrine of laches the same as a private individual in like situation, and in refusing to rule and hold that the equitable principle and doctrine of laches, as comparable to the statute of limitations, is applicable to the facts stated in the opening statements of counsel for defendants.

As we have already pointed out, although the causes of action of the government are of a character which prior to the adoption of the Rules of Civil Procedure were recognized as actions at law, nevertheless, said actions are in reality in the nature of equitable actions, the right to recover is governed by equitable principles, and consequently, the equitable principle of laches is applicable.

Since these actions are equitable in nature, in considering the question of the application of the equitable principles of laches, although, as a matter of law, the statute of limitations may not be applicable, nevertheless, we maintain that in determining the question of laches the bar of limitations may be applied by analogy in the same way as at law.

In cases of this nature equity follows the law, and in determining the question of laches, the statutory period is the measure to be applied.

In the case of *The Washington Loan and Trust Company* v. *Darling*, 21 App. D. C. 132 (1903), Mr. Justice Shepard, in speaking for the court, said (p. 140):

"The doctrine has been too long established to require citation of authority, that in cases of concurrent jurisdiction courts of equity will hold themselves bound by the statute of limitation that would govern an action at law upon the same demand; and where the subject-matter of the demand is one ordinarily cognizable at law, but, by reason of special conditions, the remedy for its enforcement in the particular case is obtainable solely in equity, the bar of limitation will be applied, either in obedience to the statute, or by analogy, in the same way as at law.

"Upon obvious grounds, equity follows the law in all such cases; and for the same reason that it will apply the bar to the enforcement of the demand in accordance with the rule of the statute, it will, ordinarily at least, refuse to apply the bar of laches on a delay of less duration. Conceding that a court of equity may not consider itself absolutely bound to apply the rule of the statute in all cases of the kind, yet, at the very least, there must be something extraordinary in the special circumstances of a particular case to justify the denial of relief, on the ground of laches, when by the terms of the statute there could be no bar in a corresponding action at law.

"We perceive no such exceptional circumstances in the case at bar."

In these several actions the rights of the banks against the government, as the holders of its checks drawn on the Treasurer of the United States, are the same as those accorded by commercial practice to the checks of private individuals, and by reason thereof, we maintain that the equitable doctrine of laches is applicable here.

In *United States* v. *Guaranty Trust Company,* 293 U. S. 340 (1934), Mr. Justice Brandeis said (p. 350):

"As against the United States, the rights of the holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals."

The causes of action of the government, being in the nature of equitable actions, the government must do equity

before it can recover. Since in actions of such a nature the government must recover, if at all, solely by virtue of the application of equitable principles, we maintain that it likewise results that the equitable principle of laches should be applied in denial of the right of the government to recover.

On each of the checks sued on the right of action of the government, if any, against the banks accrued upon the presentation to and payment by the government of each said check, and in determining the question of laches, the measure of time runs from the date of the presentation and payment of each said check.

We submit that our contention, that the equitable principle of laches is applicable here, is supported by the following cases:

In *Cooke* v. *United States*, 91 U. S. 389 (1875), the court said (p. 398):

> "Laches is not imputable to the Government, in its character as sovereign, by those subject to its dominion. U. S. v. Kirkpatrick, 9 Wheat., 735; Gibbons v. U. S., 8 Wall., 269, (75 U. S., XIX., 453). Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."

Again, in *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334 (CCA, 9th Cir., 1929), the court said (p. 336):

> "While the statute of limitations does not run against a right of action in favor of the government (United States v. Thompson, 98 U. S. 486, 25 L. Ed. 194), as said in United States v. Nat. Exchange Bank, 270 U. S. 526, 70 L. Ed. 717, 'The United States does business on business terms.' Where the right of action is for the recovery of money paid upon a forged instrument, the United States is subject to the same rules applicable to litigants generally."

United States v. *National City Bank of New York*, 28 F. Supp. 144 (D. C., S. D., New York, Jan. 30, 1939):

Action by the United States against the bank to recover from defendant the amount of a check which the bank had endorsed and collected from the United States, it being claimed that the endorsement of the payee was a forgery.

Leibell, District Judge (p. 150):

> "While it is true that 'laches is not imputable to the government, in its character as sovereign, by those subject to its dominion,' it is equally true that 'if it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there'. Cooke, et al. v. United States, 91 U. S. 389, 398, 23 L. Ed. 237. The government in this case has become a party to commercial paper. As such it has abandoned its character of sovereign and has submitted itself to all the responsibilities of a private individual in like position. The government is not asserting a right which is vested in it as a sovereign government. It is asserting a claim which any private citizen as maker of a check might assert under similar circumstances. It therefore loses that immunity which the sovereign might otherwise possess and 'does business on business terms', as was said by the United States Supreme Court in United States v. National Exchange Bank of Baltimore, 270 U. S. 527, at page 534, 70 L. Ed. 717. 'As against the United States, the rights of the holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals.' United States v. Guaranty Trust Co., 293 U. S. 340, at page 350, 79 L. Ed. 415."

United States v. *Clinton National Bank,* 28 Fed. 357 (Cir. Ct., S. D., Iowa, 1886):

Action by the United States against the bank to recover money collected by it from the Assistant Treasurer of the United States on the forged endorsement of the payee of a check drawn by a paymaster of the United States Army. Judgment for defendant.

Brewer, J. (p. 358):

> "Do the facts stated constitute a defense? That no mere statute of limitations will bar a claim for money

due the government is settled. U. S. v. Thompson, 98 U. S. 486. But the defendant contends that the government, dealing in commercial paper, is subject to the same rules and obligations that control individuals in like transactions, and that, as between individuals, * * *. The first of these two propositions was decided in Cooke v. U. S., 91 U. S. 389."

England National Bank v. *United States,* 282 Fed. 121 (CCA, 8th, Cir., 1922):

Sanborn, Circuit Judge (p. 127):

"If the suggestion presents itself that the laches or negligence of the officers or agents of the United States in this matter are not imputable to it, the answer is that, while this rule may prevail in cases in which the nation is protecting or enforcing its right as a sovereign, 'still', as Chief Justice Waite said in Cooke v. United States, 91 U. S. 389, 398 (23 L. Ed. 237), 'a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals, and, if it fails in this, its claim upon the parties is lost. United States v. Barker, 12 Wheat. 559. Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect'. See also, United States v. Bank of the Metropolis, 40 U. S. (15 Pet.) 377, 392, 393, 10 L. Ed. 774."

In concluding the argument under this heading we maintain that the government was not acting in its sovereign capacity in dealing with commercial paper, and that the right of action of the government is subject to the application of the equitable principle of laches just as any private litigant in like situation.

CONCLUSION.

In conclusion, it is respectfully submitted that the court below erred in granting the motion of plaintiff below for a directed verdict, and in directing the jury to return verdicts for plaintiff against the several defendants, and for the reasons hereinbefore stated, the several judgments of the court below should be reversed.

Respectfully submitted,

ARTHUR PETER
GEORGE P. HOOVER
Attorneys for Appellant,
The Washington Loan and Trust Company.

(No. 8247)

FRANK J. HOGAN
NELSON T. HARTSON
Attorney for Appellant,
The Riggs National Bank of Washington, D. C.

(No. 8248)

GEORGE P. HOOVER
WALTER B. GUY
Attorneys for Appellant,
The Columbia National Bank of Washington.

(No. 8249)

APPENDIX

INDEX TO APPENDIX.

	Page
Complaint	2
Answer	4
Motion to strike	11
Order denying motion to strike defenses of defendant	11
Request for admission of facts under Rule 36 of the Rules of Civil Procedure for the District Court of the United States for the District of Columbia	12
Statement of defendant, The Washington Loan and Trust Company, in response to the request of plaintiff for admission of facts and genuineness of documents under Rule 36 of the Federal Rules of Civil Procedure	14
Motion for summary judgment	16
Request for admission of facts under Rule 36 of the Rules of Civil Procedure for the District Court of the United States for the District of Columbia	17
Statement of defendant, The Washington Loan and Trust Company, in response to the request of plaintiff for admission of facts under Rule 36, of the Federal Rules of Civil Procedure (served November 21, 1941.)	18
Stipulation respecting deposition of Reno E. Stitely	21
Order consolidating causes for trial	22
Order denying motion for summary judgment	23
Transcript of proceedings	23
Opening statement on behalf of the United States by Mr. Long	24
Opening statement on behalf of defendants by Mr. Hoover	27
Opening statement on behalf of the Riggs National Bank by Mr. Hartson	47
Motion by plaintiff for directed verdict	48
Opinion of Adkins, J.	48
Verdict and judgment, Civil Action No. 1218	58
Verdict and judgment, Civil Action No. 1219	60
Verdict and judgment, Civil Action No. 1220	61
Statement of points on which defendants (appellants) intend to rely on appeal	63

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8247.

THE WASHINGTON LOAN AND TRUST COMPANY, A CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 8248.

THE RIGGS NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

and

No. 8249.

THE COLUMBIA NATIONAL BANK OF WASHINGTON, A CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeals from the District Court of the United States for the District of Columbia.

APPENDIX TO BRIEF FOR APPELLANT.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS DESIGNATED BY APPELLANT.

1 Endorsed: Filed January 5 1939

In the District Court of the United States

For the District of Columbia

Civil Action, File No. 1218

UNITED STATES OF AMERICA

v.

THE WASHINGTON LOAN AND TRUST COMPANY, A Corporation, Ninth and F Streets, Northwest, Washington, D. C.

Complaint for Recovery of Money Paid on Forged Endorsements

FIRST COUNT.

Paragraph 1. The plaintiff, the United States of America, a corporation sovereign, by its attorney, David A. Pine, United States Attorney for the District of Columbia, states to this Honorable Court that the defendant, The Washington Loan and Trust Company, a corporation, at all times hereinafter referred to engaged in the business of banking in the District of Columbia, owes the plaintiff the sum of Twenty-nine Thousand Three Hundred Thirty-four Dollars and Forty-nine Cents ($29,334.49), paid by the plaintiff to the defendant under a mistake of fact, on the dates and under the circumstances hereinafter mentioned.

Paragraph 2. Certain checks were drawn on the Treasurer of the United States by officers or agents of the United States duly authorized to draw such checks, copies whereof, with the endorsements thereon, are hereto annexed and marked Exhibits A-1 to A-362 inclusive. Each of the said checks was issued and, thereafter, was endorsed with a signature purporting to be the true and genuine signature of the payee thereof, but said signature was in fact false, forged, and counterfeit.

2 Paragraph 3. Each check, after said false, forged and counterfeit endorsement had been placed thereon, was endorsed by the defendant and was presented by the

defendant for payment to the said Treasurer of the United States at Washington, D. C., which said Treasurer, believing said false, forged, and counterfeit endorsement to be the true and genuine signature of the payee named on the face of the check, paid to the defendant the amount thereof. Each of the said checks, so endorsed and so paid, is listed in Exhibit B annexed hereto and incorporated herein, according to number, symbol, amount, and date of payment.

WHEREFORE, the plaintiff demands judgment against the defendant for the amounts so paid by the plaintiff to the defendant on the said checks, in the total amount of Twenty-nine Thousand Three Hundred Thirty-four Dollars and Forty-nine Cents ($29,334.49), and interest on the amounts paid on the said checks from the date of each payment, according to the schedule annexed hereto as Exhibit B, besides costs.

SECOND COUNT.

Paragraph 1. And for further complaint, the said plaintiff, the United States of America, adopts by reference and herein incorporates the averments of Paragraph 2 of the First Count of this action and states that each check, after said false, forged, and counterfeit endorsement had been placed thereon, was endorsed by the said defendant, The Washington Loan and Trust Company, a corporation, at all times hereinafter referred to engaged in the business of banking in the District of Columbia, in the manner and form set out in Exhibits A-1 to A-362 inclusive, and that the defendant did thereby guarantee the genuineness of the prior endorsements upon the said checks, including the endorsements of the payees named on the faces of the said

3 checks; that the said guarantees were made as part of the said endorsements in order to induce the plaintiff to pay the amounts of the said checks to the defendant; that the defendant presented the said checks for payment to the said Treasurer of the United States at Washington, D. C., which said Treasurer, relying upon the guarantees of

the defendant as to the validity of the endorsements upon the said checks, and solely because thereof, paid to the defendant the amounts of the said checks on the dates listed in Exhibit B annexed hereto.

WHEREFORE, the plaintiff demands judgment against the defendant for the amounts so paid by the plaintiff to the defendant on the said checks, in the total amount of Twenty-nine Thousand Three Hundred Thirty-four Dollars and Forty-nine Cents ($29,334.49), and interest on the amounts paid on the said checks from the date of each payment, according to the schedule annexed hereto as Exhibit B, besides costs.

(s) DAVID A. PINE,
United States Attorney.

(s) WILLIAM S. TARVER,
Assistant United States Attorney.

* * * * * * * * *

4 Filed February 15 1939

Answer of the Defendant, The Washington Loan and Trust Company.

First Defense.

Answer of the defendant to the first count of the complaint of plaintiff.

The defendant, The Washington Loan and Trust Company, for answer to the first count of the complaint of plaintiff filed herein, says:

1. It admits that it is, and at all times mentioned in said complaint was, a body corporate, engaged in the business of banking in the District of Columbia; it denies each and every other averment of Paragraph One of said complaint.

2. It admits that certain checks were drawn on the Treasurer of the United States by officers or agents of the United States, duly authorized to draw such checks, and that copies thereof, with the endorsements thereon, are annexed to said complaint, marked Exhibits A-1 to A-362, inclusive;

it admits that each of said checks was issued, and thereafter, was endorsed with a signature purporting to be
5 the true and genuine signature of the payee thereof; it is without knowledge or information sufficient to form a belief as to the truth of the averment in Paragraph Two of said first count that said signature was in fact false, forged and counterfeit.

3. It admits that each said check was endorsed by this defendant and presented by it for payment to the Treasurer of the United States, but says it is without knowledge or information sufficient to form a belief as to the truth of the averment that before being endorsed by it, any such check had endorsed thereon any false, forged and counterfeit endorsement; it admits that there was paid to it by the Treasurer of the United States the amount of each such check, but it is without knowledge or information sufficient to form a belief as to the truth of the averment that the said Treasurer of the United States made said payments, believing said alleged false, forged and counterfeit endorsement to be the true and genuine signature of the payee named on the face of each such check; it denies that plaintiff is entitled to demand judgment against it in the amount of Twenty-nine Thousand Three Hundred Thirty Four Dollars and Forty-nine Cents ($29,334.49), with interest thereon, as in said first count of said complaint averred, or in any amount whatever.

First Defense.

Answer of the defendant to the second count of the complaint of plaintiff.

The defendant, The Washington Loan and Trust Company, for answer to the second count of the complaint of plaintiff filed herein, says:

1. Answering the averment of plaintiff, whereby
6 it adopts by reference and incorporates in the second count of its complaint the averments of Paragraph Two of the first count thereof, this defendant hereby

adopts, refers to and embodies herein its answer to Paragraph Two of said first count with like effect as if herein fully repeated.

Further answering said Paragraph One, it admits that each said check was endorsed by it in the manner and form set out in Exhibits A-1 to A-362, inclusive, but says it is without knowledge or information sufficient to form a belief as to the truth of the averment that before being endorsed by it any such check had endorsed thereon any false, forged and counterfeit endorsement.

It is advised that the averments of said Paragraph One of said complaint as to the legal effect of the endorsement of each said check by this defendant, state merely conclusions of law, and it denies that there was imposed upon it any such legal obligations as are averred therein; it denies that any such guaranties, as averred by plaintiff, were made as part of the said endorsements in order to induce the plaintiff to pay to it the amounts of the said checks; it admits that it presented said checks for payment to the Treasurer of the United States, but says it is without knowledge or information sufficient to form a belief as to the truth of the averment that the said Treasurer, relying upon the guaranties of this defendant as to the validity of the endorsements upon the said checks, and solely because thereof, paid to the defendant the amounts of the said checks on the dates listed in Exhibit B, annexed to said complaint; it denies that plaintiff is entitled to demand judgment against it in the amount of Twenty-nine Thousand Three Hundred Thirty Four Dollars and Forty-nine Cents ($29,334.49), with interest thereon, as in said second count of said complaint averred, or in any amount whatever.

7

Second Defense.

The right of action set forth in the first and second counts of the complaint did not accrue within three years next before the commencement of this action.

Third Defense.

If each of the checks drawn on the Treasurer of the United States, referred to in the first and second counts of the complaint, copies thereof being marked Exhibits A-1 to A-362, inclusive, was made payable to the order of a fictitious or non-existing person, and such fact was known, or by the exercise of reasonable care and caution should have been known, to plaintiff, by and through its agents, servants or employees, and by reason thereof each of said checks was payable to bearer, and even if it be a fact that the signature of the payee of each said check was forged, as in said complaint averred, nevertheless, defendant not having notice or knowledge of said alleged forgery, was entitled to present each of said checks for payment to the Treasurer of the United States and to receive payment thereof.

Fourth Defense.

On each of the said checks drawn on the Treasurer of the United States, referred to in the first and second counts of the complaint, copies thereof being marked Exhibits A-1 to A-362, inclusive, the plaintiff was both drawer and drawee, and by so drawing said checks plaintiff admitted the existence of the payee and his then capacity to endorse
8 each of said checks, and by reason thereof plaintiff is precluded from asserting the fictitious character of the payee named thereon, or his incapacity to endorse each of said checks, and is thereby estopped to set up against this defendant the alleged forgery of the endorsement of said payee thereon.

Fifth Defense.

If the signature of the payee endorsed on each of the checks drawn on the Treasurer of the United States, referred to in the first and second counts of the complaint, copies thereof bearing date beginning November 4, 1932, to and including March 25, 1937, being marked Exhibits A-1 to A-362, inclusive, was in fact false, forged and count-

erfeit, as in said complaint averred, yet, the defendant says that plaintiff was negligent in that it failed to exercise reasonable care and caution in making an examination of its pay rolls, vouchers, books and records, and the said checks, and failed to take reasonably proper and necessary precautions to cause reconciliations to be made of its vouchers, books and records and disbursements, and the checks referred to in the complaint herein, and by the exercise of such reasonable care plaintiff could and would have prevented any loss of money caused by or attributable to any such alleged forgery, and by reason thereof plaintiff is estopped from setting up as against this defendant the alleged forgery of the signature of the payee endorsed on each of said checks.

Sixth Defense.

If the signature of the payee endorsed on each of the checks drawn on the Treasurer of the United States, referred to in the first and second counts of the com-
9 plaint, bearing date beginning November 4, 1932, to and including March 25, 1937, copies thereof being marked Exhibits A-1 to A-362, inclusive, was in fact false, forged and counterfeit, as in said complaint averred, yet, the defendant says that had the plaintiff exercised due and reasonable care in causing an examination to be made of its pay rolls, vouchers, books and records, and the said checks, and had exercised reasonable care in causing reconciliations to be made of its pay rolls, vouchers, books, records and disbursements, and the checks referred to in the complaint herein, it could promptly have discovered and detected any such forgeries, and by the exercise of reasonable care could and would have prevented the repetition of any such forgeries and any loss of money caused by or attributable thereto; wherefore, and by reason thereof, plaintiff is estopped from setting up as against this defendant the alleged forgery of the signature of the payee endorsed on each of said checks.

Seventh Defense.

If the signature of the payee endorsed on each of the checks drawn on the Treasurer of the United States, referred to in the first and second counts of the complaint, bearing date beginning November 4, 1932, to and including March 25, 1937, copies thereof being marked Exhibits A-1 to A-362, inclusive, was in fact false, forged and counterfeit, as in said complaint averred, yet, the defendant says that the plaintiff continuously from the drawing and issuing by it of the first of said checks bearing date November 4, 1932, to and including the drawing and issuing by it of the last of said checks bearing date March 25, 1937, negligently and carelessly failed to exercise reasonable care and caution in causing said checks to be drawn and issued, and in causing to be made and examined its payrolls, vouchers, books and records, and negligently and carelessly failed to cause examinations, checks, comparisons and reconciliations of its pay rolls, vouchers, books, records and disbursements, and the checks referred to in the complaint filed herein, and by reason of the said acts and omissions of plaintiff this defendant was misled and induced to believe, and did believe, that each of said checks had endorsed thereon the genuine signature of the payee named therein, and to accept and continue to accept, said checks as genuine, and by reason thereof this defendant invokes, and in equity and good conscience, is entitled to have applied hereto the equitable principle and rule that if any loss is to fall on one of two innocent parties, the one whose neglect or lack of foresight made the loss possible, is the one who must bear the burden; wherefore, and by reason thereof, plaintiff is estopped from setting up as against this defendant the alleged forgery of the signature of the payee endorsed on each of said checks.

Eighth Defense.

If the signature of the payee endorsed on each of the checks drawn on the Treasurer of the United States, re-

ferred to in the first and second counts of the complaint, bearing date beginning November 4, 1933, to and including March 25, 1937, copies thereof being marked Exhibits A-1 to A-362, inclusive, was in fact false, forged and counterfeit, as in said complaint averred, yet, the defendant says that after the discovery by the plaintiff of the alleged forgery of each of the said checks, plaintiff did fail and neglect promptly to notify defendant of the said alleged for-
11 geries; if plaintiff had promptly notified defendant, any loss due to said alleged forgeries could and would have been prevented, wherefore, and by reason thereof, plaintiff is estopped from setting up as against this defendant the alleged forgery of the payee endorsed on each of said checks.

Ninth Defense.

If the signature of the payee endorsed on each of the checks drawn on the Treasurer of the United States, referred to in the first and second counts of the complaint, bearing date beginning November 4, 1932, to and including March 25, 1937, copies thereof being marked Exhibits A-1 to A-362, inclusive, was in fact false, forged and counterfeit, as in said complaint averred, yet, the defendant says that after the plaintiff discovered, or, by the exercise of reasonable care and caution could or should have discovered, the alleged forgery of each of the said checks, plaintiff did fail and neglect promptly to notify defendant of the said alleged forgeries; if plaintiff had promptly notified defendant, any loss due to said alleged forgeries could and would have been prevented; wherefore, and by reason thereof, plaintiff is estopped from setting up as against this defendant the alleged forgery of the payee endorsed on each of said checks.

(s) ARTHUR PETER
Washington Loan & Trust Building
Washington, D. C.
(s) GEO. P. HOOVER
Investment Building
Washington, D. C.
Attorneys for Defendant.

* * * * * * * * * * *

13 Filed April 6 1939

* * * * * * * * * *

Motion to Strike

Comes now the plaintiff and moves the Court to strike defendant's Defenses numbered Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth, for the reason that each of the same fails to state a good defense at law and therefore is immaterial.

(s) DAVID A. PINE
United States Attorney.
(s) WILLIAM S. TARVER
Assistant United States Attorney
Court House, Washington, D. C.,
Attorneys for Plaintiff.

14 Filed June 9 1941

* * * * * * * * * *

Order Denying Motion to Strike Defenses of Defendant.

This cause having come on to be heard upon the motion of plaintiff, the United States of America, to strike the defenses of the defendant numbered Second to Ninth, inclusive, and having been argued by counsel for the respective parties, and submitted, upon consideration thereof, it is, by the Court, this 9th day of June, 1941,

ORDERED, That the said motion to strike be, and the same hereby is, denied without prejudice; and

IT IS FURTHER ORDERED, That the legal sufficiency of the said defenses of the defendant numbered Second to Ninth, inclusive, be considered and determined by the justice of this Court sitting at the trial of the said cause of action on the merits thereof at the appropriate time in the
15 trial of the said cause, in accordance with the rules of practice and procedure applicable thereto.

By the Court:

(s) DANIEL W. O'DONOGHUE
Justice.

16 Filed October 13 1941

* * * * * * * * * *

Request For Admission of Facts Under Rule 36 of the Rules of Civil Procedure For the District Court of the United States For the District of Columbia.

The plaintiff, the United States of America, requests that the defendant, the Washington Loan & Trust Company, make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility or relevancy:

1. That each of the exhibits, namely A-1 to A-362 inclusive, attached to the complaint filed in this action, and copies of which were served upon the defendant are true copies of the United States Treasurer checks endorsed by the defendant, as shown on each of said checks, and presented by said defendant for payment to the Treasurer of the United States and that upon the presentment thereof with the indorsement of the defendants shown thereon, payment of the amount shown on the face of each check was made to the defendant by the plaintiff United States of America.

2. That each of said checks, being Exhibits A-1 to A-362 inclusive, attached to the complaint filed in this action, copies of which were served upon defendant, were issued by the plaintiff United States of America in consequence

17 of fraud perpetrated by one Reno E. Stitely, an employee of the plaintiff in the falsification of payroll vouchers and that each of said checks were procured by said Reno E. Stitely from the plaintiff upon said fraudulent payroll vouchers; and that the said Reno E. Stitely forged the indorsement of the named payee appearing on each of said checks and presented the same to the defendant and received payment therefor.

3. That during the month of April, 1937 information was furnished the Director, Division of Investigation, Department of Interior, that Reno E. Stitely, Chief of the Voucher Unit, National Park Service, had been preparing fictitious and false payroll vouchers, obtaining United States Govern-

ment checks on the same, and converting the amount of said checks to his own use; that investigation was immediately made of said report; that the period of this investigation extended from April 12, 1937 to June 19, 1937, as a result of which it was determined that checks totaling $84,880.03 had been fraudulently procured by the said Reno E. Stitely; and that an investigator of the Department of Interior informed the defendant, the Washington Loan & Trust Company, during the month of April or May, 1937 that the said Reno E. Stitely, an employee of the Department of Interior, falsified payroll vouchers, procured United States Government checks, placing thereon names of fictitious persons and cashed the same, and in many instances passed them through an account with the defendant, the Washington Loan & Trust Company. That the defendant was further informed that checks were issued in such manner totaling in the aggregate of approximately $58,000.00 although the exact amount passing through the defendant bank had not been determined.

18 4. That the defendant, the Washington Loan & Trust Company, addressed to the Treasurer of the United States letter dated May 7, 1937, genuine copy of which is attached hereto marked Exhibit A.

5. That letter dated January 25, 1938 addressed to the Cashier, Washington Loan & Trust Company, from the Assistant Treasurer of the United States, genuine copy of which is attached hereto and marked Exhibit B, was received by the defendant, the Washington Loan & Trust Company.

6. That the attached copy of letter dated January 31, 1938, marked Exhibit C, is a true and genuine copy of letter sent by the defendant, the Washington Loan & Trust Company to the Treasurer of the United States.

(s) EDWARD M. CURRAN
United States Attorney.

(s) BERNARD J. LONG
Assistant United States Attorney.

* * * * * * * * * *

24 Filed October 22 1941

Statement of Defendant, The Washington Loan and Trust Company, in Response to the Request of Plaintiff for Admission of Facts and Genuineness of Documents Under Rule 36 of the Federal Rules of Civil Procedure.

The defendant, The Washington Loan and Trust Company, in response to the request of plaintiff for admission of facts and genuineness of documents under Rule 36 of the Federal Rules of Civil Procedure, for the purpose of this action only, without waiving, but expressly reserving, any and all objections as to the competency, materiality or relevancy thereof, states:

1. It admits the matters of fact contained in Paragraph One of said request.

2. In response to Paragraph Two of said request, it states that said paragraph of said request does not call for the admission of facts, but, on the contrary, requests admission of mixed matters of law and fact and conclusions of law and fact. Rule 36, Federal Rules of Civil Procedure, does not authorize such a request as is contained in said Paragraph Two of said request, nor does it require this defendant to admit or deny said request for admis-

25 sion.

In further response to Paragraph Two of said request, it states that it is without knowledge or information sufficient to form a belief as to whether said checks mentioned in said request, being Exhibits A-1 to A-362, inclusive,

(a) Were issued by the plaintiff in consequence of fraud perpetrated upon the United States by one Reno E. Stitely, an employee of the plaintiff, in the falsification of payroll vouchers, or

(b) That each of said checks were procured by said Reno E. Stitely from the plaintiff upon said fraudulent payroll vouchers, or

(c) That the said Reno E. Stitely forged the endorsement of the named payee appearing on each of said checks, and because it is without such knowledge or information, it is unable to admit or deny the request for admission with respect thereto.

Further responding to Paragraph Two of said request, it admits that each of said checks, being Exhibits A-1 to A-362, inclusive, were presented to it by said Reno E. Stitely, and that he received payment therefor.

3. It is without knowledge or information sufficient to form a belief as to the truth of the matters of fact contained in Paragraph Three of said request, save and except it admits that sometime during the month of April or May, 1937, an investigator of the Department of Interior informed it that the said Reno E. Stitely, an employee of the Department of Interior, falsified payroll vouchers, procured United States Government checks, placing thereon names of fictitious persons and cashed the same, and in many instances, passed them through an account with it; it admits that at or about the time aforesaid, it was further informed that checks were issued in such manner totaling in the aggregate, approximately $58,000, although the exact amount passing through the banking house of this defendant had not then been determined.

4, 5 and 6. It admits the facts contained in Paragraphs Four, Five and Six of said request and the genuineness of the documents mentioned in said paragraphs, attached to said request, being marked respectively, Exhibits "A", "B" and "C".

THE WASHINGTON LOAN AND TRUST COMPANY

By (s) GEO. M. FISHER
Vice President and Treasurer.

(s) ARTHUR PETER
Washington Loan & Trust Building
Washington, D. C.

(s) GEO. P. HOOVER
Investment Building
Washington, D. C.
Attorneys for Defendant.

* * * * * * * * * *

28 Filed October 24, 1941

* * * * * * * * * *

Motion for Summary Judgment

Now comes the plaintiff, the United States of America, and moves the Court to enter summary judgment for plaintiff, and for cause therefor says:

1. The Request for Admission of Facts filed in this cause on October 13, 1941, is admitted by the defendant as a matter of law, for the following reasons:

A. So much of the defendant's response to the request of plaintiff for admission of facts as attempts to answer questions 2 and 3 thereof, does not comply with the rules of this Court; is not made in good faith; and is an attempt to resist compliance with Rule 36 of the Federal Rules of Civil Procedure for the United States District Courts.

2. The pleadings, admissions on file, together with the affidavits attached to and made a part of this motion, show that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a mat-

29 ter of law.

Respectfully submitted,

EDWARD M. CURRAN
United States Attorney

BERNARD J LONG
Assistant United States Attorney

48 Filed November 21 1941

* * * * * * * * * *

Request for Admission of Facts Under Rule 36 of the Rules of Civil Procedure for the District Court of the United States for the District of Columbia.

The plaintiff, the United States of America, requests the defendant, The Washington Loan & Trust Company, to make the following admissions for the purpose of this action only, subject to all pertinent objections to admissibility or relevancy:

That Reno E. Stitely, while an employee of the United States Department of the Interior, National Park Service, prepared payroll vouchers purportedly for payment to named individuals as employees, but who, in fact, were not in the employ of plaintiff nor rendered the services to plaintiff shown on the payroll vouchers, and who in fact were fictitious or non-existing persons. The checks drawn payable to said persons named on the vouchers, being Exhibits A1 to A362, inclusive, except Exhibit A22, attached to the complaint filed in this action, copies of which were served upon the defendant, were obtained upon the presentation of said payroll vouchers by Reno E. Stitely from the United States Disbursing Officers or their agents who drew said checks on behalf of the United States relying upon the apparent validity of the payroll vouchers, and who were not aware of the false character of said payroll vouch-
49 ers, or that the payees were fictitious or non-existing.

After obtaining possession of the checks, Reno E. Stitely endorsed on the back thereof the names of the various payees and then placed his own name thereon as second endorser and presented the same to the defendant and received payment therefor.

EDWARD M. CURRAN
United States Attorney
BERNARD J. LONG
Assistant United States Attorney.
Attorneys for Plaintiff.

* * * * * * * * * * *

50 Filed December 1—1941

* * * * * * * * * * *

Statement of Defendant, The Washington Loan and Trust Company, in Response to the Request of Plaintiff for Admission of Facts Under Rule 36, of the Federal Rules of Civil Procedure (Served November 21, 1941.)

The defendant, The Washington Loan and Trust Company, in response to the request of plaintiff for admission of facts under Rule 36, Federal Rules of Civil Procedure, for the purpose of this action only, without waiving, but expressly reserving any and all objections as to the competency, materiality or relevancy thereof, states:

1. It admits:

(a) "That Reno E. Stitely, while an employee of the United States Department of the Interior, National Park Service, prepared payroll vouchers purportedly for payment to named individuals as employees, but who, in fact, were not in the employ of plaintiff nor rendered the services to plaintiff shown on the payroll vouchers, and who in fact were fictitious or non-existing persons."

(b) "The checks drawn payable to said persons named on the vouchers, being Exhibits A1 to A362, inclusive, except Exhibit A22, attached to the complaint filed in this action, copies of which were served upon the defendant, were obtained upon the presentation of said payroll vouchers by Reno E. Stitely from the United States Disbursing Officers or their agents who drew said checks on behalf of the United States relying upon the apparent validity of the payroll vouchers, and who were not aware of the false character of said payroll vouchers, or that the payees
51 were fictitious or non-existing."

2. In response to the request as to admission concerning:

"After obtaining possession of the checks, Reno E. Stitely endorsed on the bank thereof the names of the various payees and then placed his own name thereon as second endorser and presented the same to the defendant and received payment therefor"—

(a) It admits:

"After obtaining possession of the checks, Reno E. Stitely * * * placed his own name thereon as second endorser and presented the same to the defendant and received payment therefor."

(b) It is without knowledge or information sufficient to form a belief as to whether "after obtaining possession of the checks, Reno E. Stitely endorsed on the back thereof the names of the various payees * * *."

Pursuant to said Rule 36 of the Federal Rules of Civil Procedure, defendant states the following reasons why it cannot truthfully admit or deny said request for admission:

1. Because it is without knowledge or information sufficient to form a belief as to whether said Reno E. Stitely endorsed on the back of the checks in suit the names of the various payees, it is unable to admit or deny said request of plaintiff for admission with respect thereto.

2. As appears of record, plaintiff by its said request, calls upon defendant for the expression of an opinion as to whether said Reno E. Stitely endorsed on the back of the checks in suit the names of the various payees.

3. Rule 36 of the Federal Rules of Civil Procedure:

(a) Does not call upon nor require defendant to express an opinion as to whether said Reno E. Stitely endorsed on the back of the checks in suit the names of the various payees.

52 (b) Does not impose any duty or obligation on defendant to interview any witness or witnesses of plaintiff to ascertain what, if any, testimony such witness or witnesses may be able to give with respect to whether said Reno E. Stitely endorsed on the back of the checks in suit the names of the various payees.

(c) Does not call upon nor require defendant to accept any invitation of plaintiff to interview said Reno E. Stitely for the purpose of ascertaining whether said Reno E. Stitely, if called as a witness by plaintiff, would testify that he did endorse on the back of the checks in suit the names of the various payees.

4. In order to enable defendant to truthfully admit or deny the said request for admission, it would be required to incur considerable and unreasonable expense, and thereby would be unduly and unnecessarily burdened and oppressed.

5. Defendant is advised, and upon such information, avers that a certain report purporting to have been made by Robert C. McCarthy and Cecil G. Miles, Special Agents, Department of Interior, embodied in the printed report of hearings before the Committee on Public Lands and Surveys, United States Senate, Seventy-fifth Congress, Third Session, on the nomination of Ebert K. Burlew to be First Assistant Secretary of the Interior, pages 128 to 133, among other things, states:

(a) That the investigation of the alleged activities of Reno E. Stitely, Chief of the Voucher Unit, National Park Service, Department of the Interior, involved 1116 checks totalling $84,800.03, covering the period from September 19, 1932 to March 15, 1937. (p. 130)

(b) "Dr. Wilmer Souder, handwriting expert for the National Bureau of Standards, has examined 566 Treasury checks bearing Stitely's endorsement and is con-
53 vinced that 388 of these checks bear the endorsement of the payees in the handwriting of Reno E. Stitely; that 166 other checks have been forged, probably by Stitely, and the remaining 12 cannot be proved definitely to have been forged by Stitely." (p. 133)

6. Defendant is advised, and upon such advice, avers that said Reno E. Stitely is available to and may be called by plaintiff as a witness to testify whether he did in fact endorse on the back of the checks in suit the names of the various payees.

THE WASHINGTON LOAN AND
TRUST COMPANY
(By (s) GEO. M. FISHER
Vice President and Treasurer.

(s) ARTHUR PETER
Washington Loan & Trust Building
Washington, D. C.

(s) GEO. P. HOOVER
Investment Building
Washington, D. C.
Attorneys for Defendant.

* * * * * * * * * *

106 Filed April 24 1942

* * * * * * * * * *

Stipulation Respecting Deposition of Reno E. Stitely.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that on December 10, 1941, upon motion of plaintiff, the Court entered an order authorizing the taking of the deposition of Reno E. Stitely, who was then serving a prison sentence at the District of Columbia Reformatory, Lorton, Virginia, as a wit-
107 ness for and on behalf of plaintiff in the above entitled causes of action; that said deposition was taken on December 17, 1941, and filed in said causes of action on January 5, 1942; that in the course of the taking of said deposition, said Reno E. Stitely testified that he forged the name of the payee on each of the checks sued on in the above entitled causes of action, with the exception of the check payable to R. M. Klocber, in the sum of $47.67, being Exhibit No. A-22, in Civil Action, File No. 1218.

It is further stipulated and agreed that in the course of the argument of counsel before Justice O'Donoghue on the motion of plaintiff for summary judgment, the aforesaid deposition of Reno E. Stitely was brought to the attention of the Court, and was before the Court at the time that the order of January 14, 1942, denying motion of plaintiff for summary judgment, was entered.

This stipulation entered into this 23rd day of April, 1942.

(s) EDWARD M. CURRAN
United States Attorney.

(s) BERNARD J. LONG
Assistant United States Attorney,
Court House,
Washington, D. C.
Attorneys for Plaintiff.

(s) ARTHUR PETER
Washington Loan & Trust Building,
Washington, D. C.

(s) GEO. P. HOOVER
Investment Building
Washington, D. C.
Attorneys for Defendants,
The Washington Loan and Trust Company
and
The Columbia National Bank of Washington.

HOGAN & HARTSON

(s) By NELSON T. HARTSON
Colorado Building
Washington, D. C.
Attorneys for Defendant,
The Riggs National Bank of Washington, D. C.

* * * * * * * * * *

55 Filed January 14 1942

* * * * * * * * * *

Order Consolidating Causes for Trial.

Upon motion of defendants, and consent of plaintiff, in the above entitled causes of action, and it appearing to the Court that said causes of action involve common questions of law and fact, upon consideration thereof, it is, by the Court, this 14th day of January, 1942,

56 Ordered, That the said causes of action be, and they hereby are, consolidated;

And It Is Further Ordered, That said order of consolidation be, and the same shall be, effective on and from the 12th day of January, 1942.

By the Court:

(s) DANIEL W. O'DONOGHUE
Justice.

* * * * * * * * * *

57 Filed January 14 1942

* * * * * * * * * *

Order Denying Motion for Summary Judgment.

The above entitled causes having come on to be heard upon the several motions of plaintiff, United States of America, for summary judgment, and having been argued by counsel for the respective parties and submitted, upon consideration thereof, it is, by the Court, this 14th day of January, 1942,

58 Ordered, That the said motions of plaintiff for summary judgment be, and the same hereby are, denied.

By the Court:

(s) DANIEL W. O'DONOGHUE
Justice.

* * * * * * * * * *

60 Filed Apr 24 1942 Charles E. Stewart, Clerk

TRANSCRIPT OF PROCEEDINGS.

Washington, D. C.,
Tuesday, March 10, 1942.

The above-entitled cause came on for trial before Associate Justice Jesse C. Adkins, in Circuit Court No. 2 at 10 o'clock a.m.

Appearances:

On behalf of the Plaintiff:
Bernard J. Long, Assistant United States Attorney.

On behalf of the Defendant, The Washington Loan and Trust Company:
George P. Hoover.

On behalf of Defendant Columbia National Bank,
Frederick B. Warder.

On behalf of Riggs National Bank,
Messrs. Hogan & Hartson, by
Nelson T. Hartson.

61 Whereupon, after having been examined upon voir dire, the jury was empanelled and sworn to try the issues between the plaintiff and the several defendants.

Thereupon, counsel for the respective parties proceeded to make their opening statements to the jury:

(Opening statement on behalf of the United States by Mr. Long.)

Mr. Long: Ladies and gentlemen of the jury, as you have previously been informed, the action which is about to be tried is that of the United States against the Washington Loan & Trust Company, Columbia National Bank and the Riggs National Bank.

On January 5, 1939, the United States of America filed three separate suits at law, civil action No. 1218 was filed against the Washington Loan and Trust Company to recover the sum of $29,334.29.

Now, the Government has withdrawn the sum of $47.67 from this complaint.

One action, No. 1219, is against the Riggs National Bank of Washington, D. C. and was filed to recover $3,806.86. Third action No. 1220 was filed against the Columbia National Bank to recover $48,602.57.

Pursuant to an order of Court these three suits have been consolidated for trial and will therefore be presented to you as if there was but one suit.

The Government expects to show you that there was paid to the defendant banks by the United States of America the

amounts sued for upon forged endorsements of Government checks. The payment to each of the banks by the United States was through a mistake, because the defendant banks had no title to the checks or proceeds thereof and
62 were not entitled to receive the money we sue for.

When the defendant banks obtained the amount of the funds which is the subject of these suits from the United States, they represented to the United States as a matter of law, by reason of their endorsements appearing on the back of each check, guaranteeing all prior endorsements, that the checks were genuine; that the bank had good title, and that all prior endorsements were genuine.

The evidence will disclose that the payee's signatures to the various checks were forgeries and that the defendants made a false warranty of genuineness to the United States; hence the right of action arises in favor of the United States against each of the defendant banks for the amount sued for together with interest from the time of the demand, of the amounts paid by the United States to the respective defendant banks.

The United States of America will ask you to render a verdict in accordance with the instructions of the Court as to the law, against each of the defendant banks for the amounts claimed, with interest on each check from the date of payment. There is filed with each complaint in this action a schedule showing the check number, its date, the amount of each check and the date when it was paid to the respective banks by the United States. There also accompanies the complaint as exhibits photostatic copies of each of the checks involved in the three suits.

The evidence will show you that one Reno E. Stitely, who was employed by the United States Department of the Interior prepared fictitious payroll vouchers from which he obtained from the United States Disbursing Officer the the checks in question.

63 The Disbursing Officers were duly appointed agents of the United States, authorized to draw Gov-

ernment checks, and were unaware of the fraud practiced by Reno Stitley, and drew the checks in the belief that they were being made payable to existing persons as compensation for services rendered to the United States.

It will appear that Stitely obtained possession of the checks, endorsed the payees' name to each check, and in most instances cashed them or deposited the same to the account of the defendant, Washington Loan & Trust Company.

The signature of the person to whom the checks were payable being forged by Stitely, under the law, the banks who received them got no title to the checks or any right to receive payment from the United States upon these checks. As previously stated to you, the banks obtained the amount of the checks on presentation of them to the Treasury of the United States upon their warranty of genuiness and of guarantee of the genuine endorsement of the payee's name. This is a matter of law.

The Treasurer of the United States was entitled to rely on any payment to the banks. It will also be shown that the Government made demand on the respective defendant banks for repayment of the amounts sued for, but that the defendants have refused to reimburse the Government, thus necessitating the present action.

The pleadings, the admissions of the defendants, which are on file in the action, and the documentary evidence will prove all the material allegations of the complaint, and the Government will show you by the deposition of Reno E. Stitely, who is now confined in jail for having committed the forgery, that he signed the payee's names to each of the various checks.

64 Now, the defendants seek to avoid liability of the Government's claim upon various grounds: They claim among other things that they are not liable in these actions to return to the Government the money sued for because there was negligence on the part of the Government in connection with the issuance and delivery of the checks to Reno E. Stitley, and the failure of the Government to have discovered the forgeries earlier than they did.

The position of the Government is, if there was any such negligence, such was not the proximate cause of the damage which was caused by the false representation and warranties made by the defendant banks to the United States, and the failure of the banks to perform the responsibility placed upon them under the law in seeing that the endorsement was genuine.

Furthermore, that there was no duty of vigilence owing by the United States to the defendant banks, and that the Government was not bound to anticipate the intervention of a criminal act of Stitely's or bound by his criminal acts.

On the conclusion of the case the Government will expect you on the evidence to render a verdict in favor of the United States, in accordance with the Court's instructions as to the law, against each of the defendant banks for the amounts sued for, together with interest from the date of the payment of each check.

I thank you.

Opening Statement on Behalf of Defendants by Mr. Hoover.

Mr. Hoover: If your Honor please, and ladies and gentlemen:

This may be the first time that some of you ladies and gentlemen may have been called upon to perform
65 jury duty, and in a preliminary way I would like to say that in a case of this kind where the plaintiff has made an opening statement of what the plaintiff expects to prove, as the case set out in the pleadings, the defendant has the option either to make an opening statement at the beginning of the case, before any evidence is adduced, or wait until after the Government has introduced its evidence, the Government being the plaintiff, and then after having heard the testimony of the plaintiff, the defendant then makes its opening statement, telling the jury what it or they expect to prove.

Whatever may be said by learned counsel representing the Government in this case in his opening statement, or whatever I may say in my opening statement, is not evidence and shall not be considered as evidence by you ladies and gentlemen of the jury when you come to decide this case. Your verdict will be based on the evidence as you hear it from the depositions which will be read, and from the testimony of witnesses who will appear on the witness stand and testify orally, and according to the instructions of the Court.

The purpose of an opening statement is for counsel to outline the case to the jury and to let the jury know what the case is, to paint a picture from their standpoint of the evidence, so that you will be able more readily to appreciate the testimony of the witnesses in the light of the opening statements which have been made by counsel, as to what is expected to be proved by either side.

Now, in this case you have already been advised that in reality there are three cases, but inasmuch as the three cases involve questions of law, to a large extent similar, in order to facilitate the trial of the cases, the cases have been consolidated for trial by order of the Court, and
66 consequently they are tried as one case, but as you will be told by his Honor, when you come to decide the case, you will render individual verdicts in each of the three cases.

Now, in the case against the Washington Loan & Trust Company, the amount sued for is $29,334.49. When the case was originally filed the complaint was based upon the alleged forgery of 362 checks. Since that time the Government has withdrawn its claim as to one check, being Exhibit 22, so that it is not any longer in the case.

In the case of the Columbia National Bank the amount sued for is $48,602.57, and in the case of the Riggs National Bank the amount sued for is $3,864.86.

The whole case of the Government is based upon the claim that names of the payees in the checks were forged

by Reno E. Stitely, who was employed in the National Park Service during this period from 1932 to 1937.

He occupied the position of Chief of the Voucher Unit in the Accounts Section of the National Park Service, and it is claimed by the Government, as the opening statement indicates, that by fraudulent vouchers prepared by Stitely, he obtained these checks from disbursing officers of the Government, in some instances from the office of Chief of Finance of the United States Army, and in some instances from disbursing officers in the Treasury Department.

All but relatively few of the checks were obtained by fraudulent vouchers which were presented to the office of the Chief of Finance of the United States Army, which is in the War Department.

In all three cases there are involved 1,072 checks, and in all three cases the amount claimed by the Government is $81,801.72.

67 In addition to the claim for the amount of the check, as has been stated by counsel for the Government, the Government also claims interest on each one of these checks from the date of the payment of each one of the checks up to the time this case shall be determined by your verdict and the judgment entered upon the verdict.

In order that you may have an appreciation of what that interest amounts to we have had a calculation made in the cases involving the Columbia National Bank and the Washington Loan and Trust Company. The calculation of interest on each one of these checks from the date of payment to February 28th, 1942—this being a convenient date to which to calculate the interest—shows that the interest on the checks involved in these two cases amounts to a little more than $30,000, so that the claim of the Government in all three of these cases, involves more than $110,000, therefore it is a case of magnitude and importance, and naturally it is very much in the interest of justice that the jury render

a verdict in accordance with the evidence, and in accordance with the instructions of the Court as to the law.

I might say at the outset, without going into the law, that one of our principal defenses in this case is what is known in law as equitable estoppel. That defense may shortly be stated, in this manner—one of our principal claims in this case is that this man began to prepare these false vouchers, which relates to the first check, being dated November 4, 1932, and then he continued to falsify these vouchers from that time on until March, 1937.

One of our defenses is that the United States Government was negligent in that if the United States Government had kept proper records, if the National Park Service had received proper statements from the War De-
68 partment, which the evidence shows the National Park Service could have received, if such requests were made to the Chief of Finance of the United States Army, that the keeping of proper books and the balancing of those books and reconciling the books of the National Park Service with the books and records and statements which were in the War Department, and readily accessible to, and which could have been obtained by the Park Service, that the defalcations of this man would have been discovered immediately; and we say, by reason of this long course of conduct, that we had reason to believe and did believe that man, Stitely, when he came to the bank to present these checks for deposit or for cash, as the case may be, we believed, and we had every reason to believe, that he had the right to present the checks for deposit or to receive payment for them, and that by that course of conduct we were misled by the Government and, therefore, we ask that there shall be invoked in this case, what is known as the equitable doctrine of estoppel, that is, the doctrine of equity and justice between individuals in a lawsuit, and that is really what his particular defense is, and that is all it is: That you do justice between the United States and the defendants in

this case, just as you would ask and demand that justice be done between you and some other individual if you were placed in the same situation as the defendants here are placed in this case. When we say that, we shall ask his Honor to instruct the jury that in a case of this kind, where one of two innocent persons must suffer, the law says that the one who should bear the loss, the one who should in equity and good conscience be required to bear the loss is the one who made it possible for the third person to perpetrate this fraud, and that is the Government, in this case.

69 That being our position, it is necessary for us to outline the evidence, which will establish the facts upon which we claim we have the right to invoke that doctrine in this case.

On April 10, 1933, pursuant to the terms of an Act of Congress of March 31, 1933, which was commonly known as the National Recovery Act, the primary purpose of which was to create work in order to do away with unemployment, the President of the United States issued a proclamation, and under that proclamation, these CCC camps were established in various National and State Parks throughout the United States, and, under the terms of the Executive Order issued by the President of the United States the Chief Finance Officer of the United States Army was made the disbursing officer to disburse all of the funds which had been allocated for these various CCC camps throughout the country.

Now, some time in December, 1931, or January, 1932, this man, Reno E. Stitely, became the Chief of the Voucher Unit of the Accounts Section of the National Park Service. Some time in April, 1937, the National Park Service undertook to draw a check on a certain fund which had been allocated for certain of the activities in the National Park Service, which was commonly known as the working fund. It appears that the National Park Service had rented

some space in the Bond Building, at 14th and New York Avenue, and they were about to draw a check for the payment of the rent for that space. That fund was being disbursed by the Disbursing Officer of the Treasury Department, and at the time there was communication between the National Park Service and the Disbursing Officer of the Treasury, and when they discussed the matter, the officer in the Disbursing Office of the Treasury in substance said, "You better go slow about that, because you haven't enough money in the working fund to honor that check," and the National Park Service employe in substance said, "Why, according to our books, it shows that we have about $7,000 balance in that account," and the Treasury said, "No, all you have in there, your balance is about $300." Well, now, that started an investigation, that discrepancy, and on April 9, 1937, the National Park Service directed a letter to the General Accounting Office. The General Accounting Office is the respositary where all of these vouchers go for ultimate audit, and the National Park Service requested the General Accounting Office to furnish them photostatic copies of any vouchers that might have been charged against this working fund, and in which they thought they had a balance of approximately $7,000.

The letter to the General Accounting Office was written on April 9th, and Stitely was there when the letter was written, and realizing that he was going to be exposed, he pretended to be sick and went home. As a result of writing of that letter, the General Accounting Office sent to the National Park Service photostatic copies of certain vouchers, which showed that during the period between April 17th, 1936 and August 15th, 1936, Stitely had falsified five payroll vouchers, involving 54 checks, amounting in all to $6,855.60.

When the vouchers were received by the National Park Service, which is in the Interior Department, they called upon the Bureau of Investigation of the Interior Depart-

ment to make an investigation, and there was revealed what I have just stated.

Now, it appears that pursuant to the executive order of April 10, 1933, these CCC camps were established in various National and State Parks throughout the United States, and among the Parks in which the CCC camps were established was the Shenandoah National Park in Virginia.

The investigation by the Bureau of Investigation of the Interior Department revealed that from July 1, 1933 to March 31st, 1937, Stitely had been going every payday to the Office of the Chief of Finance of the War Department and taking with him, or there had been sent to the Finance Officer, what was known as the long form payroll voucher, a legitimate payroll which carried the names of the persons who were employed in the Administrative or Clerical forces of the National Park Service in Washington who had duties to perform in connection with the CCC camps; and along with that legitimate payroll he began to make up and present to the Finance Officer these false payrolls. The fraudulent voucher was known as a short form voucher, and he had been carrying these fraudulent vouchers to the War Department Chief of Finance Office, as I say, from the first payroll day, which was July 15th, 1933, until the end of March, 1937, and I will say more about that later as I come to describe it in detail.

Now, after Stitely left the office of the National Park Service on April 9, 1937, because of this expose of these checks which he had obtained against this working fund, which was being disbursed by the Treasury, when it came time to send the legitimate payroll from the National Park Service over to the Chief of Finance in the War Department, on April 15th, 1937, someone else took it over there. When a young lady from the Park Service took the payroll, legitimate long form payroll over, one of the clerks in the Office of the Chief of Finance said, "Where is the short-form payroll," and, of course, she knew nothing about it, so she indicated that to her Chief and he got in touch with Mr. Spen-

72 cer Burroughs, Chief Clerk in the Office of the Chief of Finance, U. S. Army, and then it was revealed that Stitely had been going to the Chief of Finance during all of this period and taking over this fraudulent short-form payroll.

Now, in addition to that, the evidence will show that when they had completed the investigation, it was revealed that Stitely had falsified 134 payrolls, comprising 1,116 checks aggregating $84,880.03.

The evidence will also show that before the promulgation of the Executive Order of the President of the United States on April 10, 1933, which created and established these CCC camps, Stitely had been falsifying vouchers on other accounts.

For example, the evidence will show that beginning on September 19th, 1932, that the National Park Service had certain funds which had been allocated to the Great Smoky Mountains, George Washington's Birthplace, and Roads and Trials accounts in other parks, and the evidence will show that from September 19th, 1932 to June 30, 1933, Stitely had falsified 24 vouchers, involving 113 checks, aggregating $7,355.19.

Now, that was before the CCC camps were created and, as I stated a moment ago, he began falsifying vouchers relating to CCC camps with the payroll beginning July 1, 1933 and continued to March 31, 1937, involving 91 payrolls and 799 checks, aggregating $57,512.64.

The evidence will show that during this period Stitely went to the office of the Chief of Finance of the United States Army, as I have stated, every payday, which was twice a month. The legitimate or long form payroll voucher was either sent to the Finance Office or Stitely took it with him, and when he went over to the Finance office on each payday he took along with him the fraudulent short

73 form voucher, and he talked with Mr. Spencer Burroughs, the Chief Clerk of the Finance Office and told Mr. Burroughs the reason he brought over the short form voucher was because of the fact that the Superintendent

of the Shenandoah National Park came into Washington, every payday and that because of the fact that some of the men were working in different places, scattered around, that it was impossible to get all of the payroll made up until the very day on which payment was to be made, and for that reason he brought over this short form payroll on paydays, and he waited in the office of the Chief of Finance until those checks were made out from this short-form payroll. He then got the short-form payroll checks and the long-form payroll checks, the long form payroll checks, he took back to the office, and they were distributed to the persons entitled to them, and the short-form payroll, or the checks payable to the fictitious persons whose names appeared on the fraudulent vouchers he forged the names of the payees and received the money.

When these payrolls were made up, there was an original and two copies and Stitely took to the office of the Chief of Finance the original and two copies of these fraudulent payrolls; that is, these short form vouchers.

According to the regulations, the original of these payroll vouchers, the original of all of these payroll vouchers, both legitimate and fraudulent, that went to the Chief of Finance of the Army, were, sometime after the end of the month sent to the Office of the Comptroller General, where they were later finally audited. One copy of the voucher was retained in the office of the Chief of Finance, and the other copy was to be sent or returned to the office from
which it originated, in this case, the National Park
74 Service, but Stitely got that copy of the fraudulent
voucher, and instead of returning that copy to the National Park Service, he just destroyed it.

Now, this evidence will show that there were five or six real camps in the Shenandoah National Park during this period from July 1, 1933 to the end of March, 1937, that is, camps where they had enrollees. These CCC camps were established for the purpose of enrolling young men who could not obtain employment, and thereby giving them em-

ployment and education while we were going through the depression period.

In each of these five or six real camps, in addition to the enrollees, that is the young men who were in the camps under training, each camp had what is known as a civilian facilitating personnel, consisting of one superintendent and eight foremen. Those were the civilian employees in these real camps and in making up these fictitious payrolls, Stitely made up these fictitious payrolls to conform to the payrolls that were made up in each of these real camps; in other words, in each of the real camps there were a superintendent and eight foremen, so that nine names appeared on the legitimate payroll every two weeks, and in this imaginary camp which Stitely established, he had a superintendent and eight foremen just the same as they had in the real camps.

Now, in the course of this period, during this period, an Act of Congress which is commonly known as the Economy Act, became effective in 1933, under the terms of which Act a deduction of fifteen percent was made in the salaries of all employees of the Government and, of course, that fifteen percent deduction likewise applied to all of these civilian employees in the real camps.

Now, Stitely, in order to have his imaginary men,
75 fictitious men in this imaginary camp conform to the practices in the real camps, in making up the fraudulent payroll vouchers he deducted fifteen per cent from the salaries of these men whose names appeared on these payrolls. In addition, it will appear that from time to time they had reclassifications of these men in the real camps; increases in salaries and decreases in salaries, and whatever and whenever anything occurred in any of the real camps, either reclassifying, increases or decreases in wages, or men getting leave, or anything of that sort, why Stitely in making up his fraudulent payroll vouchers—because he was there in the Voucher Office, and knew what was being done—he made up his fraudulent payroll to conform to the legitimate payrolls in the real camps.

Now, as I said a moment ago, in each of these real camps they had these enrollees; the CCC camps were established for their benefit and in the interest of educating these young men and fitting them for useful places in life, and they had inspectors in the War Department, whose duty it was to inspect these camps.

In addition to that the Finance Office of the War Department paid all the enrollees in the real camps. They also had inspectors in the National Park Service whose duty it was to inspect these CCC camps, but none of the inspectors of either the War Department or National Park Service ever discovered that this camp that Stitely was making out the payrolls for was something which was only a figment of his imagination.

Now, under this executive order of the President of the United States of April 10, 1933, certain moneys were allocated for these CCC camps. The Treasury Department, pursuant to the Executive Order of the President,
76 allocated a lump sum to the Chief of Finance of the United States Army, out of which the disbursements were made for the benefit of the CCC camps, so that the Treasury Department, of course, could not know anything about the disbursement of this money until the fund which had been allocated for the CCC camps and placed to the credit of the Finance Officer of the War Department, so that he might draw against it, until it had been actually exhausted.

Now, at the beginning of this activity of the CCC camps, it appears that there were several conferences held between the representatives of the National Park Service and representatives of the Finance Office of the United States Army with a view of endeavoring to arrange some system of accounting between those two offices.

These vouchers, that is, these legitimate vouchers which were made up for the CCC camps in the various parks, they contained a symbol which was what is known as the Procurement Symbol, that is, the office in which the voucher originated, it also contained a symbol known as a Purpose

Number, that is, whether it was for the purpose of paying wages, paying contractors or for materials or anything else. Then there was another symbol which designated the appropriation to which the disbursement should be charged, because when the money was allocated by the Treasury Department to the Chief of Finance, it was allocated as being chargeable against certain appropriations, but, as the evidence will show, no proper system of accounting was agreed upon between the National Park Service and the Chief of Finance, United States Army, it, of course, being primarily a matter for the Park Service, because it was their immediate duty to see about this, but at any rate
77 they did not have any symbol on the vouchers, designating the particular park in which the camp was located, or whether the park was in the Eastern or Western part of the United States, or just where the camp was located. I am speaking of the genuine vouchers, and the same is true of the vouchers which were fraudulent; they didn't have any symbol to tell whether the park in which this CCC camp was located was in the Western part of the United States or the Eastern, or where it was, so there was no means of checking the vouchers.

Now, that continued along in that manner without any check at all, without any proper books being kept to show what money was being expended from this fund, until around July 1, 1936, and about that time a conference was held between representatives of the National Park Service and representatives of the Office of the Chief of Finance of the United States Army, with a view of getting additional information from the statements which came from the War Department, showing symbol designation, so they could identify the parks to which these disbursements should be charged; so they could know whether the camp was located in the Shenandoah Park or where it was located, and that information did not come to the National Park Service until October, 1936. When the additional information was received it covered the period only up to July, 1936, so that following the receipt of this additional infor-

mation, and after the expose of Stitely, the Acting Secretary of the Interior, on June 15th, 1937, wrote to the War Department, requesting additional information, which would show the designation of camp and park in which it was located, covering the period from the time the camps were established in 1933, up to the time the request was made, and the Chief of one of the Divisions in the War Department, who had charge of that matter, testified
78 in a deposition that when the order came to him in the War Department, he took ten men off their regular work, borrowed some adding machines from another Division, and started to work on it and was able to finish it on August 3, 1937.

Now, we will show, and the evidence will establish, that during this period from 1932 to 1937, the National Park Service did not keep a proper set of books; that they did not have any books at all, that was the real truth of the matter, I mean books in the sense of books which would show you what was being done with the money and how it was being expended, nor did they receive from the War Department proper statements so that they could have reconciled or balanced their books to show where this money was expended.

As a matter of fact the evidence will show that if Stitely had not been caught up in this defalcation relating to this so-called working fund, where there was just a limited amount of money, $7,000 which had been allocated to that fund, he could have gone on with this matter in the Park Service, if they had not kept any better books, than they had kept during this period, until the whole lump sum which had been allocated to the Finance Office of the War Department had been exhausted; so it was only because of the fact that Stitely became, I guess, so bold, that he started to tap this small working fund, and that led to his exposure.

Now, the evidence will show that in addition to the voucher unit, of which Stitely was chief, there was in the Accounts Section a bookkeeping unit, and Stitely testified by way of deposition, which was taken on the part of the Government,

that he knew that the National Park Service was not keeping proper books, and consequently the Park Service
79 could not balance its books or reconcile its books with the records of disbursements in the Finance Office, and the evidence will also show that had the proper books been kept that Stitely's defalcations could have been discovered.

Now then, in addition to that, the evidence will show that on one occasion, when Stitely went over to the office of the Chief of Finance, he talked with Mr. Spencer Burroughs, Chief Clerk and told him about having gone to Florida, how he had shipped his automobile by freight, and he went down by plane, shipped his automobile back by freight and he came back by plane. He said he spent $2,500 on the trip, but the evidence will show that whatever the trips were, and whenever Stitely went away, he always took these trips on days other than paydays, in periods between paydays, because he was always on hand on paydays to present these false vouchers so as to get these checks.

Now then, the evidence will show that at the time the Senate was considering the nomination of Ebert K. Burlew as Assistant Secretary of the Interior, an investigation was made by the Senate Committee on Public Lands and Surveys which revealed all this activity on the part of Stitely; that the investigation began on January 11, 1938, and continued until February 12, 1938, and on January 25, 1938, the Government made demand upon the defendants here to repay this money and suit was filed by the Government on January 5, 1939.

Now, during this period, in an address made by the President of the United States, directed to all of the banks of the Country, on September 28th, 1935, the President called upon the banks to cooperate with the Government in cashing checks which were made in payment of Government obligations, and payrolls, similar to the Works Prog-
80 ress and other activities of that kind, such as the CCC camps.

We will show in this case that Stitely became a depositor in the Washington Loan and Trust Company, opening a checking account in the name of Reno E. Stitely, being No. 117509, which account was opened on January 11, 1932, and closed June 19th, 1934. During this period that this account was in existence there were deposits made therein totalling $8,928.75, and during this period deposits in that account were made of five of the checks sued on in this case, against the Washington Loan & Trust, or the Columbia National Bank, amounting in all to $296.51.

On June 14th, 1934, a checking account was opened, being No. 119676 in the name of Dorothy R. Stitely, who is the wife of this man, Reno E. Stitely, and that account, as of March 4, 1935, was changed to a joint account in the names of Dorothy R. or Reno E. Stitely. That either one or both could draw checks against that account, and the evidence will show that during the period from June 14th, 1934 to the last deposit on March 31, 1937, there was deposited in cash, or checks drawn on local banks, $32,990.29.

There was also deposited 60 of the checks sued on by the Government in the total amount of $4,812.11, the suit on those checks being against The Columbia National Bank.

In addition, Stitely deposited in this account some 48 other Government checks which are not sued on here.

There was also an account opened by Reno Stitely, a savings account in his own name, on January 21, 1933, which was closed on May 22, 1935, and during the period that account was open and in effect, up to the time of the last deposit, on January 3, 1934, there was deposited in that account in cash $3,626.22, including $660 being the proceeds of a collateral loan made to Stitely on October 18,
81 1933; that is, he borrowed $660 from the bank. He deposited in the bank certain securities as collateral for the loan and the proceeds of the loan were deposited to this account. No Government checks were deposited in this account.

There was also another account by Stitely as guardian, and that account was opened on July 21, 1934, and was

closed on October 6th, 1934. From the opening of this account on July 21, 1934 to the last deposit on October 1, 1934, there was deposited in this account cash in the amount of $1,461.59, one Government check sued on amounting to $76 and two Government checks, not sued on, amounting to $62.41.

I might explain about that guardian account, that that account was opened on July 21, 1934, and it was in effect until October 6th, 1934, at which time the account was called to the attention of Mr. James M. Mason, who is Assistant Treasurer of the Company, and he inquired if Stitely had proper papers from the Court as guardian and Stitely told him he had not, that he had opened the account because he was acting as guardian, not as legal guardian, but as protector for his brother, the account was then closed, and Stitely opened up a new account which was opened in the name of Reno E. Stitely for Romulus G. Stitely.

That account was opened on October 6th, 1934 and closed February 10, 1937.

During that period there was deposited in this account cash and checks drawn on local banks from the opening of the account on October 6th, 1934 to the last deposit, July 22nd, 1936, in the amount of $10,428.68.

There was also deposited in this account eleven Government checks sued on, amounting in all to $1,138.96.

In addition, there were deposited in this account three Government Checks not sued on, aggregating $270.77.

82 There was another account opened by Stitely in his own name, which was a savings account, opened February 10, 1937 and closed April 12, 1937. There was only one deposit in this account, which was made on February 10, 1937, consisting of one Government check sued on, amounting to $75 and $280.54 in cash.

Now, between July 12, 1933 and October 10th, 1933, securities were purchased for Stitely by the Washington Loan & Trust Company costing in all $8,484.34. It is the usual practice of banks, and was the practice of the Washington Loan & Trust Company, as well as other banks during this

period, if depositors went to the bank and said that they would like to have an order placed to buy securities such as stocks and bonds, the banks placed the order with one of the brokerage houses, bought the stock, and charged it to the account of the customer or getting a check to cover the cost.

In connection with these loans which were made to Stitely these collateral loans, it appears that he wanted to sell some securities which he had in those collateral loans, and sales of those securities were made on March 9, 1934, the evidence will show the transactions in detail, will show that the sales were made to Hibbs & Company and the net proceeds of the sales amounted to $3,035.41.

At the time these sales were made, Stitely was indebted to the bank in the sum of $2,960, which was a collateral loan for which these securities were collateral, and when the sale was made, the principal and interest of the loan amounting to $2,985.65 was paid and the balance of the net proceeds of the sale amounting to $49.76, was paid to Stitely in full.

I mention these transactions which the evidence will show,
for the reason that we will claim, and the evidence
83 will establish, that the course of dealings which
Stitely had with the Washington Loan & Trust Company were ordinary dealings which any depositor would have with any bank in the District of Columbia; nothing unusual about the transactions; nothing to attract our attention, nothing to cause us to be suspicious and, consequently, we had no notice that these checks had been forged by Stitely until after this expose had been made.

In addition, we will show that the Washington Loan & Trust Company has two offices, one at 9th and F Streets, Northwest, and another known as the West End Office, which is located at the southwest corner of 17th and G Northwest, and that the West End Office was opened in 1917.

We will show, and the evidence will establish, that because of the fact that this West End Office is very conveniently located to many of the Government buildings, that they do a landoffice business there on paydays in cashing Government checks; that they cash Government checks on Government paydays aggregating several hundred thousand dollars, and it was a common practice for employees in the various departments to come to the bank and bring not only their own checks, but to bring checks of other employees, and one man might either cash or deposit as many as ten, fifteen or more checks, even as many as twenty-five, and that was a practice that was ordinary, that was usual, and when Stitely came in and was doing the same thing that there was nothing unusual about what Stitely was doing to attract the attention of the officers or employes of the bank to anything that might reveal any dishonesty on his part, and there was nothing suspicious about it.

Now then, you have been told that the Washington
84 Loan & Trust Company is sued for $29,000 and The Columbia National Bank is sued for $49,000. We will show that each one of the checks involved in both these cases, were either cashed by or deposited in the Washington Loan & Trust Company, and the way that came about was this: Stitley would deposit in the West End Branch of the Washington Loan & Trust Company some of these checks, and out of these seven hundred or more checks that he either deposited or cashed there, out of the total number of checks sued on in the cases against the Washington Loan & Trust Company and the Columbia National Bank, there were only about seventy checks which were deposited, and the remainder of the checks were cashed.

The system which was in effect in the bank was substantially this, as the evidence will show: That when the Government checks—not only Stitely's checks, but all Government checks—that when Government checks were received for deposit or were cashed, that the paying and receiving teller, because at that time there was one teller who was

both receiving and paying teller, the checks received for deposit, they went to what is known as the proof desk where they were tabulated, and the Government checks which had been received for deposit were put in one pile, and Government checks cashed put in another pile.

Now, as to the Government checks which were cashed, very often, after having cashed many of these checks, the paying and receiving teller of the bank, Mr. Smith, who was the principal teller, or Mr. Mason, who was Assistant Treasurer, in case they felt they needed cash, they would send these Government checks which had been cashed, to the office of the Treasurer of the United States by a runner, and that is in common parlance, what is known as presenting the checks over the counter.

85 The runner would take the checks down to the Treasury in the morning and then go to the main office of the bank to transact any business he might have there, meanwhile, the Treasurer would tabulate the checks and count them and add up the amount and then the runner would go back to the Treasury later in the day and he would receive cash for checks which he had presented.

Now, the bank presented to the Treasury the checks which they wanted to have cash on, but the checks that they didn't need cash on, they went through another course, and that was this: That all of the Government checks received for deposit, they were put in with the other checks drawn on other banks which had been received for deposit. We have here what is known as a Clearing House—the National Banks being active members of that association, and the Trust Companies being associate members—the Washington Loan & Trust Company is now an active member, but for years past it had been the practice of the Washington Loan & Trust to make its clearances through the Columbia National Bank—so that all the Government checks which were received for deposit, and many of the Government checks which were received and cashed, which had not been presented to the office of the Treasurer of the United States,

these checks were sent down to the main office of the Washington Loan & Trust Company at 9th and F Streets, and when they were received down there they were put in with other clearance items, as they are termed, that is, checks which were drawn on other banks, and all of the checks went through The Columbia National Bank, that is, they were cleared through The Columbia National Bank, and were presented by that bank to the Treasury for payment.

86 The Columbia National Bank, in presenting these checks to the Treasury of the United States for payment did not receive payment in cash, but they were paid through a credit to be entered on the books of the Federal Reserve Bank in Richmond, which practice is followed by all the banks which have accounts with the Federal Reserve System, and so The Columbia National Bank got credit with the Federal Reserve for the Government checks it presented to the Treasurer.

I mention that, because the evidence will show it, and so you will understand it.

Now then, we will produce as witnesses the officers and employees of The Washington Loan and Trust Company. I think every one of the employees who handled these transactions is available, and they will testify as to just what happened in the way of receiving these checks for deposit or cashing the checks when presented by Stitely.

The evidence will show that The Washington Loan & Trust Company and The Columbia National Bank had no reason to be suspicious about the actions of Stitely; that these transactions were all conducted in the regular course of business, and, as I stated, our principal defense in this case is that this loss was brought about by the failure of the United States Government, either in the National Park Service or the Office of the Chief of Finance, but chiefly in the National Park Service, to keep proper records, so that they could have balanced their books and reconciled their books with the records of the War Department, where it could have obtained all of the information it desired, and

this failure of the Government allowed Stitley to go on during all of this period.

Applying the equitable principles which have already been outlined, we shall ask his Honor to instruct you that if you find the evidence to be as I have stated, that that principle is applicable, namely that where, because
87 of the negligence of one person, a loss has been brought about, that as between two innocent persons, the loss must be suffered by the person whose negligence enabled the fraud to be perpetrated, and that being the case, we shall ask a verdict at your hands for the defendants.

I thank you.

Opening Statement on Behalf of the Riggs National Bank by Mr. Hartson.

Mr. Hartson: May it please the Court and members of the jury, I desire to make a short statement on behalf of the Riggs National Bank, one of the defendants, which bank is being sued on 59 checks, as Mr. Hoover has told you, in the total amount of dollars, $3,864.86.

Now, nothing that Mr. Hoover has told you is inconsistent with the position of the Riggs National Bank, but there are some few facts that distinguish it from both the Washington Loan & Trust and The Columbia National Bank.

Mr. Hoover has told you that certain accounts and transactions existed between Reno E. Stitely, this crook in the Federal service, and the Washington Loan & Trust. Stitely had no relationship with the Riggs National Bank at all, with respect to these 59 checks, on which the Riggs National Bank is sued, and the evidence will show that Stitely had taken these 59 checks and cashed them at merchants' establishments, we might say, which merchants had accounts with the Riggs National Bank, and they deposited these checks in the Riggs National Bank, 59 of them, on which the United States now seeks to recover; and the evidence will show that the Riggs National Bank after receiving these checks for deposit, presented them to the Treasurer

for payment, and they were paid years ago, as the
88 evidence will show, and that in so doing the Riggs National Bank was acting as an agent for the customers, and establishing those facts, we will expect under the Court's instructions, that you will render a verdict for the defendant.

Mr. Hoover is carrying the burden of this defense. What I have said I don't wish you to take as inconsistent with anything he said, but the facts are slightly different.

Thereupon, counsel for plaintiff moved the Court to direct the jury to return a verdict for the plaintiff, based on admissions of defendants in the file, and the opening statement of the defendants to the jury, on the ground that there is no defense in law stated to the plaintiff's cause of action.

Whereupon, the Court excused the jury in order that the arguments of counsel on the said motion for directed verdict could be heard by the Court out of the hearing and presence of the jury.

Thereupon, counsel for plaintiff and defendants proceeded with the presentation to the Court of their arguments respectively in support of and in opposition to the motion of plaintiff for a directed verdict; said arguments being heard by the Court on March 10, 11 and 12, 1942.

Whereupon, at the conclusion of said arguments by counsel, the Court took under advisement said motion of plaintiff for a directed verdict, and announced an adjournment of the Court until Monday, March 16, 1942.

Whereupon, upon the resumption of the trial of the said causes of action on Monday, March 16, 1942, the Court (Adkins, J.) in ruling on the motion of plaintiff, orally delivered the following opinion:

89 I am very much impressed with the manner in which counsel have prepared the cases and presented the arguments on the motion. It is one of those cases where the more preparation on the part of counsel, the more work the court has had to do in examining this multitude of decisions. The real difficulty seems to be that there is

considerable conflict of authority on more than one of the propositions of law involved.

There are many cases where a decision either may fail to impress the court as being exact justice. For instance, in many cases today the doctrine of contributory negligence seems unfair; this is one of the cases where I think the authorities and decisions, either way, are not in accordance with precise justice. Probably that is the reason for the change which has taken place in the last 40 or 50 years in the growth of the law on this subject; so with that, I will give you the conclusions I have reached.

In the first place, the checks involved were not payable to bearer; I understood that proposition is not disputed.

Mr. Hoover: No, we are not insisting on that defense.

The Court: In the second place, in my opinion, the statute of limitations is not applicable. Section 1268 of the code provides that the statute of limitations shall not apply to any case in which the United States is the real and not merely the nominal plaintiff. I think this also disposes of the question of laches, speaking now of the equitable defense of laches as comparable to the statute of limitation.

Of course, if, after discovery of the forgery there was unreasonable delay in giving notice thereof, and the banks were prejudiced thereby, such delay would be a defense to the extent of the loss shown. That this is settled is
90 plain from Ladd and Tilton Bank v. United States, 30 F. (2d) 334. I understand no contention is made here that, because of delay in giving notice after discovery, to the banks, they suffered loss within the meaning of the rule just mentioned. I understand their contention to be that they suffered loss because the fraud continued, and they cashed additional checks.

The remaining defenses, which were very strongly relied on, were negligence in the issuance of the checks and equitable estoppel. The facts claimed to support this defense and the defense of laches are, to a large extent, the same; that is, those defenses are said to be established by pretty much the same evidence.

Stitely began his frauds as far back as 1932, the imaginary C. C. C. camp was started in 1933. The fraud was discovered in April 1937, which discovery made it impossible for Stitely to secure any more checks, and so put an end to his negotiation of such checks. As I understand it, the defendants contend that the government was negligent in permitting even the first check to be issued and that this negligence continued and increased throughout the duration of the frauds; that the fraud was discovered by accident and not by any care on the part of Government officials.

It is contended that if the Government had exercised due care in the first place, the first fraud could not have occurred; that thereafter, there was no examination and inspection of the checks; no examination and reconciliation of the books, records and accounts, and no inspection of camps; that Stitely knew of the precise condition of affairs except perhaps, as to the failure to make inspections of camps and knew of the failure to take proper safeguards in the handling of the checks generally; that if Stitely had been content to deal only with the imaginary camp,

91 he probably would never have been caught.

Mr. Hoover: That is what the witnesses testified to.

The Court: But, because he grew bolder and branched out into other accounts, the discovery came sooner than it might otherwise, if at all.

Well, if the C. C. C. Camps were ever abandoned, there might have been a check or an inventory which would have developed this situation. Similar cases have been occurring over a period of years, and my experience indicates that sooner or later they are discovered although sometimes the dishonest employee is dead when the discovery takes place. It cannot be denied that if the Government had earlier discovered the fraud, the banks would not have cashed subsequent checks.

The question is what, if any, duty was owing from the Government to the defendant banks? Whether there was any duty owing to the banks or the banks had made an actual

or implied warranty of the checks, and the genuineness of their endorsement, and whether, if the Government was negligent, that negligence was the proximate cause of the payment of the checks by the bank.

Now, the answer to these questions will depend, to some extent, on the nature of the obligation assumed by the banks when they cashed the checks, and the nature of their implied or expressed warranties to the Government.

It seems to be settled that the effect of the decisions of the Supreme Court in United States v. National Exchange Bank, 214 U. S. 302, and in Leather Manufacturers National Bank v. Merchants National Bank, 128 U. S. 26, is to hold that there was an implied warranty on the part of the banks arising out of their endorsement of the checks, that
92 is, an implied warranty of the genuineness of the prior endorsements, and the right to recover is based on the equitable doctrine of money had and received. Ladd and Tilton Bank v. U. S., 30 Fed. (2d) 334.

There was some suggestion and argument that United States v. Guaranty Trust Company, 293 U. S. 340, modified this rule. There, the Supreme Court, in holding that the title to that check there involved was passed by the forged endorsement, taking place in Jugoslavia, mentioned specifically the guarantees of the Trust Company, namely that it had legal title and the right to enforce payment of the check. But the federal courts have not considered that the Guaranty Trust decision qualified the rule that an endorsement impliedly warranted the genuineness of prior signatures. See City Bank v. Hamilton Bank, 71 Appeals, D. C., 225, 227. See also Sec. 24, Title 22 of the Code of 1929.

Now, to take up the question of negligence, it seems to me that the real question is whether the alleged negligence was the proximate cause or the remote cause of the payment by the banks on the forged endorsements. There is a decided conflict of authority on this question, but it seems to me that the weight of authority holds that negligence which permits the issuance of a check which is not payable to bearer is a remote cause and not the proximate cause. This

rule, as I understand it, has been adopted by the United States Court of Appeals for this District in Nat. Met. Bank v. Realty Appraisal and Title Company, 60 App. D. C., 88 (47 F. (2d) 982), and in the other Federal Courts, and is binding on this court.

I have examined many of the cases cited for the purpose of ascertaining what they mean by proximate and remote cause in such cases as the present, that is, what negligence will protect the person who cashes the check. In
93 National Bank v. Naltug, 94 Virginia 265, the court said the negligence must be immediately connected with the forgery. In that case, somebody had gotten a check from the bank for $10.00 drawn on some other bank and it was raised, as I recall, by a professional, that was his business, and it was contended that it was negligence, but the court held otherwise.

In Crawford v. West Side Bank, 100 New York 55, the court said "the question of negligence cannot arise unless one in drawing a check, has left blank some part of it, or by some affirmative act of negligence, has facilitated the commission of the fraud by those into whose hands the check may come," citing Young v. Grote, 4 Bingham, 253.

That is one of the early cases. There a wife had received a number of blank checks signed by her husband; she filled out one of the checks in a very careless manner, beginning the word "fifty" in the middle of the line and with a small letter, then giving it to her husband's clerk to have it cashed; and he wrote "three hundred" in front of the fifty and cashed the check as altered. It was held that that was negligence on the part of the drawer of the check which did inhere in the making of the check itself.

In Jordan March Company v. National Shawmut Bank, 201 Mass. 397, 407, which is a leading case on this subject, the court said:

"It seems plain that only negligence which is the direct and proximate cause of the payment can be effectual in the making of such defense."

In that case there were a great many checks over a period of years. The early checks were made payable to one somebody named Sefton who was a sister, I believe, of the dishonest employee and she actually endorsed a few of the first checks; thereafter her endorsement was forged. The
94 court made this distinction; that as to the checks actually endorsed by Sefton, the bank would not be liable, but as to the other checks where the signatures of the payees had been forged, the negligence was too remote to be effectual.

In Bartlett v. First National Bank, 247 Illinois 490, plaintiff learned of the forgeries, and permitted them for awhile, and it was only after the forgeries were continued and plaintiff did not get the benefit of them, that the effort was made to throw the losses on the bank. Plaintiff's agent accounted for the money received from the early forgeries; plaintiffs did caution the employee about his conduct, but did not notify the bank; the agent continued his forgeries and appropriated the money. The court held that, having learned of his conduct and profited thereby for a while, the employers would not be permitted to shift the loss to the bank when the employee thereafter kept the money which he obtained by the forgeries.

Now, it seems to me that the rule I have just been discussing has been adopted by the United States Court of Appeals for this District in National Metropolitan Bank v. the Realty Appraisal and Title Company in 60 Appeals 88.

There the negligence in issuing the checks was held to be unrelated to the conduct of the bank when it paid the forged checks. In addition to the Jordan Marsh case, supra, there are interesting discussions in United States Storage Co. v. Central Bank, 343 Ill. 503, and Armstrong v. National Bank, 47 Ohio State 523.

In the latter case, the court said if the bank did not know the person or his signature, if it acted at all, it must have been upon the confidence the bank had in the knowledge of some other person.

95 In Welch v. German American Bank, 73 New York 425, the court said that in delivering the checks to the plaintiff's clerk for the purpose of passing them on to the payee, a forgery of the payee's endorsement made the plaintiff no more responsible than if the plaintiff had entrusted the checks to an expressman for a delivery.

In the case of Shepard & Morse Lumber Company v. Eldridge, 171 Mass., 516, the court said that the holder of a check is not deprived of his rights against a drawer by merely negligently delivering that check to a clerk which due care would have told him was dishonest, and thus giving the clerk an opportunity to commit the crime.

In these two cases it was held that the negligence in issuing the checks was not a defense: Los Angeles Investment Company v. Home Savings Bank, 180 California, 601; American Sash and Door Company v. Commerce Trust Company, 332 Mo. 98, 56 S. W. (2d) 1034. Also it is held that it is not negligence to fail to discover the fraud at an earlier date; United States v. National Bank of Commerce, 205 Fed. 433, Insurance Company of North America v. Fourth National Bank, 12 F. (2d) 100.

Now there are a number of cases cited by counsel for the defendants which support their views. I think some of these can be distinguished but some of them cannot. I will discuss them hereafter.

Also it is perfectly true that there are a number of cases decided on the proposition that it is negligence to fail to discover the fraud.

However, I think this court is bound by the other views, as announced by the Court of Appeals and the cases I mentioned.

96 Now, as to the question of equitable estoppel, I think I have read all the cases which were cited on this subject in the brief of defendants and after careful consideration of them, I am of the opinion that this is not a case in which the rule applies.

The checks here involved were not payable to Stitely, they were delivered to him for the purpose of delivery to

the payees; they could not be used by him in their condition, but forgery of the names of the payees was necessary. Now, many of the cited cases, the cases cited by the defendants, I think can be distinguished on satisfactory grounds, though it is true that in many cases, the decision was in part based on equitable estoppel, and thus support the contention of defendants.

It seems to me that the language used in National Safe Deposit Company v. Hibbs, 229 U. S. 391, 396, shows the extent of the rule. All of you gentlemen are familiar with the facts in that case. There the court said:

> "Here one of two innocent persons must suffer and the question at last is, Where shall the loss fall? It is undeniable that the broker obtained the stock certificates, containing all the indicia of ownership and possible of ready transfer, from one who had possession with the bank's consent, and who brought the certificates to him, apparently clothed with the full ownership thereof by all the tests usually applied by businessmen to gain knowledge upon the subject before making a purchase of such property. On the other hand, the bank, for a legitimate purpose with confidence in one of its own employees, entrusted the certificates to him, with every evidence of title and transfer ability upon them. The bank's trusted agent, in gross breach of his duty, whether with technical criminality or not is unimportant, took such certificates, thus authenticated with evidence of title, to one who, in the ordinary course of business, sold them to parties who paid full value for them. In such case we think the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible. Applying this principle, we think the Court of Appeals was right in affirming the judgment of the Supreme Court."

Now, it seems to me the distinction is that there,
97 when the dishonest employee got the stock certificates, there was nothing else for him to do, that is, there was no way of checking up—he apparently had the title and he did not forge anything.

In this case there was this other act and it seems to me that the line has been drawn there.

In the present case, Stitely got possession of the checks not payable to bearer. However, forgery was necessary to permit him to avail himself of the proceeds; first, the actual forgery was necessary and then an implied false representation to each bank which cashed the check was necessary.

I think the facts of the present case do not bring it within this rule as announced by the Supreme Court.

Now, in many of these cases relied on, and which are applicable, to some extent, the defense of negligence, there were other grounds on which the decision could be predicated, but it is true that in many of these cases, the court relied upon this defense alone, or a combination of the two grounds. I think in some it is put squarely on this one ground of equitable estoppel.

Now, in many of those cases the checks were payable to bearer; in some cases the imposter rule was applicable; in some cases the wrongdoers were agents with authority to draw instruments which would bind their principals and they exceeded that authority. In others, the relation of bank and depositor existed, and the depositor failed to discover the forgeries within a reasonable time. In other cases, while the relation of depositor and bank may not have existed formally, nevertheless, the bank had some very definite business relation with plaintiff, and was being used by plaintiff in the performance of its business.

98 The case cited by defendants which is more like this than any of the others is United States v. Commercial National Bank, Law No. 77050 in the Supreme Court of the District of Columbia, decided by Justice Bailey. It is contended by plaintiff and I think with some force, that as to all but one check, that decision might have been grounded upon the impostor theory. However, Justice Bailey put his decision squarely on the ground of equitable estoppel and did not mention the other ground.

Counsel for defendants have called attention to the respect to which a decision by Justice Bailey is entitled. I realize that just as strongly as they do, perhaps better than they. I am acquainted with his great learning, his ability, sound judgment, and his infinite care in making a decision, and it is with great hesitation that I have found myself unable to agree with his view in that case.

In this matter, involving the question of the recovery of money received under an honest mistake of fact, there are a number of cases which hold that until there has been a request for repayment, interest is not payable—

Mr. Hoover (Interposing): Until demand is made.

The Court: Until there has been a demand yes, and I have reached the conclusion that interest should not be allowed before that date.

Now, as I recall the decisions of the Court of Appeals on the question of a motion of this kind, you have the right, if you so desire, to say anything or add anything to your statement heretofore made.

Mr. Hoover: I don't think I have anything factual to add.

Thereupon, at the conclusion of the delivering of
99 the aforesaid opinion by the Court, the jurors took their seats in the jury box, and the following occcurred:

The Court: I will say to the members of the jury that as a result of this argument, which took place during the past week, I have concluded that a verdict should be entered for the plaintiff in each case, and the clerk will now, by my direction, take your verdict in each case.

The Assistant Clerk: In pursuance of the direction of the Court in Civil Action No. 1218, United States of America versus the Washington Loan and Trust Company, a corporation, you are directed to return a verdict in favor of the plaintiff in the sum of $29,286.82, with interest from January 25, 1938, and that is your verdict, so say you each and all.

In Civil Action No. 1219, United States of America, versus Riggs National Bank of Washington, D. C., a corporation, you are directed to return a verdict in favor of the plaintiff in the amount of $3,864.86 with interest from January 25, 1938, and that is your verdict, so say you each and all.

In Civil Action No. 1220, United States of America versus Columbia National Bank of Washington, D. C., a corporation, you are directed to return a verdict in favor of the plaintiff in the sum of $48,602.57 with interest from January 25, 1938 and that is your verdict so say you each and all.

The foregoing transcript is satisfactory:

GEO. P. HOOVER
NELSON T. HARTSON
ARTHUR PETER
Attorneys for Defendants.

EDWARD M. CURRAN
BERNARD J LONG
Attorneys for Plaintiff.

100 Endorsed: Filed Mar 16, 1942 Charles E. Stewart, Clerk

Verdict and Judgment for Plaintiff

In the District Court of the United States for the District of Columbia

---

Civil No. 1218

UNITED STATES OF AMERICA *Plaintiff*

vs.

THE WASHINGTON LOAN AND TRUST COMPANY, A Corporation *Defendant*

Verdict and Judgment

This cause having come on for hearing on the 10th day of March, 1942, before the Court and a jury of good and lawful persons of this district, to wit:

Harvey L. Haight (Excused) 3/12/42
Howell A. Carrico
Walter H. Brooks
Jennie S. Emmertt
Howard F. Dabney
Raymond F. Torrillo
Nellie C. Reese
Sam Dennenberg
William Karasik
Victor L. Riston
Cuthbert F. Peterson
Ruth D. Dahlquist

who, after having been duly sworn to well and truly try the issues between United States of America, plaintiff and The Washington Loan and Trust Company, a Corp., defendant, and after this cause is heard and given to the jury in charge, they upon their oath say by direction of court this 16th. day of March, 1942, that they find the issues aforesaid in favor of the plaintiff by direction of Court and that the money payable to it by the defendant by reason of the premises is the sum of Twenty Nine Thousand Two Hundred Eighty Six Dollars and Eighty Two Cents ($29,286.82).

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of Twenty Nine Thousand Two Hundred Eighty Six Dollars and Eighty Two Cents ($29,-286.82), with interest from January 25, 1938, together with costs.

CHARLES E. STEWART,
Clerk,

By HOUSTON S. PARK, JR.
Deputy Clerk.

By direction of
JESSE C. ADKINS
Justice

100a Endorsed: Filed Mar 16 1942 Charles E. Stewart, Clerk

Verdict and Judgment for Plaintiff

In the District Court of the United States for the District of Columbia

---

Civil No. 1219

UNITED STATES OF AMERICA *Plaintiff*

vs.

THE RIGGS NATIONAL BANK OF WASHINGTON, D. C., A Corporation *Defendant*

Verdict and Judgment

This cause having come on for hearing on the 10th. day of March, 1942, before the Court and a jury of good and lawful persons of this district, to wit:

Harvey L. Haight (Excused) 3/12/42
Howell A. Carrico
Walter H. Brooks
Jennie S. Emmertt
Howard F. Dabney
Raymond F. Torrillo
Nellie C. Reese
Sam Dennenberg
William Karasik
Victor L. Riston
Cuthbert F. Peterson
Ruth D. Dahlquist

who, after having been duly sworn to well and truly try the issues between United States of America, plaintiff and The Riggs National Bank of Washington, D. C., A Corporation, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say by direction of court this 16th. day of March, 1942, that they find the issues

aforesaid in favor of the plaintiff by direction of court and that the money payable to it by the defendant by reason of the premises is the sum of Three Thousand Eight Hundred Sixty Four Dollars and Eighty Six Cents ($3,864.86).

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of Three Thousand Eight Hundred Sixty Four Dollars and Eighty Six Cents ($3,864.86), with interest from January 25, 1938, together with costs.

CHARLES E. STEWART,
Clerk,

By HOUSTON S. PARK, JR.
Deputy Clerk.

By direction of
JESSE C. ADKINS
Justice

100b Endorsed: Filed March 16, 1942

Verdict and Judgment for Plaintiff

In the District Court of the United States for the District of Columbia

---

Civil No. 1220

UNITED STATES OF AMERICA *Plaintiff*

vs.

THE COLUMBIA NATIONAL BANK OF WASHINGTON,
A Corporation *Defendant*

Verdict and Judgment

This cause having come on for hearing on the 10th day of March, 1942, before the Court and a jury of good and lawful persons of this district, to wit:

Harvey L. Haight (Excused) 3/12/42
Howell A. Carrico
Walter H. Brooks
Jennie S. Emmertt
Howard F. Dabney
Raymond F. Torrillo
Nellie C. Reese
Sam Dennenberg
William Karasik
Victor L. Riston
Cuthbert F. Peterson
Ruth D. Dahlquist

who, after having been duly sworn to well and truly try the issues between United States of America, plaintiff and The Columbia National Bank of Washington, A Corp., defendant, and after this cause is heard and given to the jury in charge, they upon their oath by direction of court say this 16th day of March, 1942, that they find the issues aforesaid in favor of the plaintiff by direction of court and that the money payable to it by the defendant by reason of the premises is the sum of Forty Eight Thousand Six Hundred and Two Dollars and Fifty Seven Cents ($48,602.57).

Wherefore, it is adjudged that said plaintiff recover of the said defendant the sum of Forty Eight Thousand Six Hundred and Two Dollars and Fifty Seven Cents ($48,-602.57), with interest from January 25, 1938, together with costs.

CHARLES E. STEWART,
Clerk,

By HOUSTON S. PARK, JR.
Deputy Clerk.

By direction of
JESSE C. ADKINS
Justice

* * * * * * * * * *

102 Endorsed: Filed April 24 1942

* * * * * * * * * *

Statement of Points on Which Defendants (Appellants), The Washington Loan and Trust Company, The Riggs National Bank of Washington, D. C., and The Columbia National Bank of Washington, Intend to Rely on Appeal.

1. The Court erred in granting the motion of plaintiff for directed verdict, and in directing the jury to return a verdict for plaintiff.

103 2. The Court erred in holding and ruling, as a matter of law, that upon the facts stated to the jury in the opening statements of counsel for defendants the negligence of plaintiff was not the proximate cause of the loss claimed to have been sustained by plaintiff by the presentation for payment, and the payment, of the checks sued on.

3. The Court erred in holding and ruling, as a matter of law, that the facts stated to the jury in the opening statements of counsel for defendants did not present any issuable fact which properly should have been submitted to the jury as to whether, upon such facts, the negligence of plaintiff was the proximate cause of the loss claimed to have been sustained by plaintiff by the presentation for payment, and the payment, of the checks sued on.

4. The Court erred in refusing to allow defendants to go to the jury, and to submit evidence in support of the facts stated to the jury in the opening statements of counsel for defendants, on the question as to whether the negligence of plaintiff was the proximate cause of the loss claimed to have been sustained by plaintiff by the presentation for payment, and the payment, of the checks sued on.

5. The Court erred in holding and ruling, as a matter of law, that the equitable principle and doctrine that where one of two innocent persons must suffer loss by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss, was not applicable to the facts stated to the jury in the opening statements of counsel for defendants.

6. The Court erred in holding and ruling, as a matter of law, that the facts stated to the jury in the opening statements of counsel for defendants did not present any
104 issuable facts which should have been submitted to the jury as to whether, upon such facts, the jury could properly have applied the equitable principle and doctrine that where one of two innocent persons must suffer loss by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss.

7. The Court erred in refusing to allow defendants to go to the jury, and to submit evidence in support of the facts stated to the jury in the opening statements of counsel for defendants, and in refusing to submit to the jury the question as to whether, upon such facts, they properly may have applied the equitable principle and doctrine that where one of two innocent persons must suffer loss by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss.

8. The Court erred in holding and ruling that the statute of limitations did not apply to the United States of America in these causes of action.

9. The Court erred in holding and ruling that the equitable principle and doctrine of laches did not apply to the United States of America in these causes of action.

10. The Court erred in refusing to hold and rule that in these causes of action the United States of America was not acting in its sovereign capacity, but had become a party to commercial paper and as such it had abandoned its character as sovereign, and had submitted itself to all of the responsibilities of a private individual in like position.

11. The Court erred in refusing to hold and rule that in dealing with commercial paper, the United States of America is subject to the equitable principle and doctrine of laches the same as any private litigant in like position.

105 12. The Court erred in refusing to allow defendants to go to the jury, and to submit evidence in support of the facts stated to the jury in the opening state-

ments of counsel for defendants, on the question as to whether, upon such facts, they properly may have applied the equitable principle and doctrine of laches in bar of the whole or any part of the causes of action of plaintiff.

(s) ARTHUR PETER
Washington Loan & Trust Building
Washington, D. C.

(s) GEORGE P. HOOVER
Investment Building
Washington, D. C.
Attorneys for Defendants, The Washington Loan and Trust Company, and The Columbia National Bank of Washington.

HOGAN & HARTSON
By (s) NELSON T. HARTSON
Colorado Building
Washington, D. C.
Attorneys for Defendant, The Riggs National Bank of Washington, D. C.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED OCT 9 - 1942

Joseph W. Stewart
CLERK

Nos. 8247, 8248, 8249

In the United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1942

WASHINGTON LOAN AND TRUST COMPANY,
A CORPORATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF THE GOVERNMENT

EDWARD M. CURRAN,
United States Attorney,
BERNARD J. LONG,
Assistant United States Attorney,
Attorneys for Appellee.

Of Counsel:
FRANCIS M. SHEA,
Assistant Attorney General.
GEORGE F. FOLEY,
ROBERT KAPLAN,
Attorneys, Department of Justice.

TABLE OF CONTENTS

SUBJECT INDEX

	Page.
Counterstatement of the case	1
Summary of argument	3
Argument	5
I. The doctrine of equitable estoppel may not be invoked by the defendants under the facts in this case	5
II. Negligence in the issuance of checks or in failing to discover the forgeries sooner is not a legal defense in the present action	9
A. Decisions involving the United States Government and rendered by the Supreme Court of the United States and the Circuit Courts of Appeals of the United States	15
B. Decisions involving states or municipalities	20
C. Decisions involving private individuals or corporations	23
Recovery is not barred by the imposter theory	32
Analysis of cases cited on behalf of appellants	33
III. The right of recovery of the United States is not barred by laches	41
Conclusion	43

TABLE OF CASES

American Exp. Co. v. *People's Sav. Bank*, 192 Iowa 366, 181 N. W. 702 (1921)	11
American Hominy Co. v. *Millikin National Bank*, 273 Fed. 550 (D. C. S. D. Ill., 1920)	34
American Sash & Door Co. v. *Commerce Trust Co.*, 332 Mo. 98, 56 S. W. (2d) 1034 (1932)	32, 35
Armour & Company v. *Green County State Bank*, 112 Fed. 631 (C. C. A. 7, 1902)	34
Bartlett et al. v. *First National Bank of Chicago*, 247 Ill. 490, 93 N. E. 337 (1910)	34
Board of Education v. *National Union Bank*, 121 N. J. L. 177, 1 A. (2d) 383 (1938), aff'd 16 N. J. Misc. 50, 196 A. 352 (1935)	23, 40
C. E. Erickson Co. v. *Iowa National Bank*, 211 Iowa 495, 230 N. W. 342 (1930)	35, 36
Central Trust Co. v. *Eureka-Security Fire & Marine Insurance Co.*, 50 Ohio App. 308 (1935), 198 N. E. 62	36, 37

Page

City of Indianapolis v. *National City Bank*, 80 Ind. App. 677, 141 N. E. 249 (1923) ---- 40
City of St. Paul v. *Merchants Nat. Bank*, 151 Minn. 485, 187 N. W. 516 (1922) ---- 22
Com. v. *Globe Indemnity Co.*, 323 Pa. 261, 185 A. 796 (1936) ---- 11, 20, 32
Continental Nat. Bank & Trust Co. v. *Olney Nat. Bank*, 33 F. (2d) 437 (C. C. A. 7, 1929) ---- 11
Defiance Lumber Company v. *Bank of California*, 180 Wash. 533, 41 P. (2d) 135 (1935) ---- 35, 36
DeWolf & Company, Inc. v. *Foreman Nat'l Bank*, 264 Ill. App. 23 (1931) ---- 38
Farmers' State Bank in Merkel v. *United States*, 62 F. (2d) 178 (C. C. A. 5, 1932) ---- 11, 17
Fulton National Bank of Atlanta v. *United States*, 107 F. (2d) 86 (C. C. A. 5th Cir., 1939) ---- 20
Guaranty Trust Company v. *United States*, 304 U. S. 126 (1938) ---- 41
Gunning v. *Cooley*, 281 U. S. 90 (1930) ---- 2
Hartford Accident & Indemnity Co. v. *Bank*, 61 Ohio App. 217 (1938), 22 N. E. (2d) 517 (1938) ---- 36, 37
Hartford Accident & Indemnity Company v. *Fifth Third Union Trust Company*, 23 F. Supp. 53 (D. C. S. D. Ohio, 1938) ---- 34–35
Hendrick v. *Lindsay, et al.*, 93 U. S. 143, 146 (1876) ---- 2
Insurance Company of North America v. *Fourth National Bank of Atlanta*, 12 F. (2d) 100, D. C. N. D., Georgia (1926) ---- 8, 11, 18, 37
Jordan Marsh Co. v. *National Shawmut Bank*, 291 Mass. 397, 87 N. E. 740 (1909) ---- 9, 11, 26, 30, 37
Kaszab v. *Greenbaum Sons Bank & Trust Company*, 252 Ill. App. 107 (1929) ---- 38
Ladd & Tilton Bank v. *United States*, 30 F. (2d) 334 (C. C. A. 9th Cir., 1929), 43 F. (2d) 665 (C. C. A. 9th Cir., 1930) ---- 20, 41, 42
Land Title & Tr. Co. v. *Northwestern Nat. Bank*, 196 Pa. 230, 46 A. 420 ---- 33
Los Angeles Invest. Co. v. *Home Sav. Bank*, 180 Cal. 601 (1919) ---- 23, 30, 37
National Metropolitan Bank v. *Realty Appraisal & Title Co.*, 60 App. D. C. 87, 47 F. (2d) 982 (1931) ---- 10, 40
National Safe Deposit Company v. *Hibbs*, 229 U. S. 391, 396 (1913) ---- 35
National Surety Corp. v. *Federal Reserve Bank*, 292 N. Y. S. 607 (1936) ---- 39
National Union F. Ins. Co. v. *Mellon Nat. Bank*, 276 Pa. 212, 119 A. 910 (1923) ---- 32
New York v. *Bronx County & Trust Co.*, 261 N. Y. 64, 184 N. E. 495 (1933), rehearing denied without opinion 261 N. Y. 622, 185 N. E. 565 ---- 8, 21, 39
North British and Mercantile Insurance Co. v. *Merchants National Bank*, 146 N. Y. S. 720, 161 App. Div. 341 (1914) ---- 39
Ocean Accident and Guarantee Corporation v. *Lincoln National Bank*, 112 N. J. L. 550, 172 N. E. 45 (1934) ---- 11
Osborne, et al. v. *Corn Exchange National Bank*, 218 Ill. App. 28 (1920) ---- 38

Page

Pannonia Building & Loan Association v. *West Side Trust Company*, 93 N. J. L. 377, 108 A. 240 (1919) ---- 39
Prudential Insurance Company v. *National Bank of Commerce*, 227 N. Y. 510, 125 N. E. 824 (1920) ---- 38, 39
Robertson Bkg. Co. v. *Brasfield*, 202 Ala. 167, 79 So. 651 (1918) ---- 11
Royal Indemnity Co. v. *Federal Reserve Bank of Cleveland*, 38 F. Supp. 621 (D. C. S. D. Ohio, W. Div., 1939) ---- 37
Shipman, et al. v. *Bank* (S. N. Y.), 126 N. Y. 318, 27 N. E. 371 (1891) ---- 27, 39
The City Bank v. *Hamilton National Bank*, 71 App. D. C. 225, 108 F. (2d) 588 (1939) ---- 10, 39
The Grand Lodge of A. O. U. W. v. *State Bank of Winfield*, 92 Kans. 876, 142 Pa. 74 (1914) ---- 30, 32
United States v. *Clearfield Trust Co., et al.* (C. C. A. 3), July 29, 1942 (unreported) ---- 11
United States v. *Clinton National Bank*, 28 Fed. 357 (C. Ct., S. D. Iowa, 1886) ---- 41
United States v. *Commercial National Bank*, at Law No. 77,050 in Sup. Ct. of D. C. (now District Court) ---- 40
United States v. *First National Bank of Prague, Oklahoma*, 124 Fed. 484 (C. C. A. 10, 1941) ---- 37, 42
United States v. *Guaranty Trust Company of New York*, 293 U. S. 340, 346 (1934) ---- 11, 37
United States v. *National Bank of Commerce*, 205 Fed. 433 (C. C. A. 9, 1913) ---- 18
United States v. *National Exchange Bank of Providence*, 214 U. S. 302 (1908) ---- 7, 8, 11, 15, 37, 41
United States v. *Thompson*, 98 U. S. 486 (1878) ---- 41
United States Storage Company v. *Central, etc., Bank*, 343 Ill. 503, 175 N. E. 825 (1931) ---- 11, 29, 34, 38
Welsh v. *German American Bank*, 73 N. Y. 424 (1878) ---- 31
White v. *Continental Nat. Bank*, 64 N. Y. 316 ---- 16, 17
Young v. *Gretna Trust & Savings Bank*, 184 La. 872, 168 So. 85 (1936) ---- 35, 36

STATUTES

D. C. Code, Title 22, Sec. 24 (1929) ---- 3, 9
D. C. Code, Title 24, Sec. 344 (1929) ---- 3, 41

MISCELLANEOUS CITATIONS

Brannan's Negotiable Instruments Law, 6th Ed. 223 ---- 12
Uniform Negotiable Instruments Law, 9 (3) ---- 34
21 C. J. 1169, 1172 ---- 6

In the United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1942

Nos. 8247, 8248, 8249

WASHINGTON LOAN AND TRUST COMPANY, A CORPORATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF THE GOVERNMENT

COUNTER STATEMENT OF THE CASE

This is an appeal from three judgments entered on March 16, 1942, by the District Court of the United States for the District of Columbia on the several judgments of a jury rendered by direction of the court against the appellants, Washington Loan and Trust Company, Riggs National Bank of Washington, D. C., and Columbia National Bank of Washington, D. C.

On January 5, 1939, the appellee, plaintiff below, filed three separate suits at law to recover from the appellants, defendants below (Appellants' App. 2–4), amounts paid to them by the United States on 1072 United States Treasury checks, drawn by duly authorized disbursing officers of the United States upon the Treasury of the United States (Appellants' App. 29). On January 14, 1942, and pursuant to an order of the court below, the cases were consolidated for trial (Appellants' App. 22).

The said several causes of action came on for trial before Adkins, Justice, and a jury on March 10, 1942 (Appellants' App. 23). The statement of the case as set forth in appellants' brief accurately outline the pleadings and proceedings below in so far as material here. There is no dispute as to the facts. The Government moved for a directed verdict at the close of the defendants' opening statements on the ground that there was no issue of fact for submission to the jury and that the government was entitled to judgment as a matter of law (Appellants' App. 48). The court directed the jury to return verdicts in favor of plaintiff (Appellants' App. 57–58). The facts set forth in the defendants' opening statements to the jury (Appellants' App. 27–48) are to be considered undisputed and admitted for the purpose of this appeal and the only question for review is whether upon the admitted facts, the court properly directed the verdicts from which this appeal is taken. *Hendrick* v. *Lindsay, et al.*, 93 U. S. 143, 146 (1876); *Gunning* v. *Cooley*, 281 U. S. 90 (1930). The statement of facts as set forth in appellants' brief is considered adequate. However, a brief repetition of the material facts is deemed advisable.

One Reno E. Stitely, while an employee of the United States National Park Service, during the period from September 1932 to March 1937, falsified United States Department of Interior payroll vouchers and obtained the United States Treasury checks from the disbursing officers of the Government involved in these actions (Appellants' App. 31–36). The payees of the checks were nonexisting or fictitious persons, which fact was not known to the disbursing officers, the drawers of the checks. They issued the checks in the regular course of business upon the presentation of the vouchers by Stitely, believing the checks to be in payment for services rendered to the government by existing employees (Appellants' App. 34–36). Stitely obtained the checks from the offices of the disbursing officers ostensibly for delivery to the payees, instead, he retained the checks, forged the payees' names and presented the same either to the defendant banks or to their prior endorsers and received payment (Appellants' App. 35, 45, 46, 47). The banks presented the checks to the Treasury of the United States, guaranteed all prior endorsements and upon such presentation and guar-

antee received the amount of the checks for which the present actions were brought (Appellants' App. 4, 14, 18, 46–48).

STATUTES INVOLVED

Title 24, Sec. 344 D. C. CODE (1929) (Action by the United States):

> None of the provisions of sections 341 to 343, inclusive, of this title shall apply to any action in which the United States is the real and not merely the nominal plaintiff (Mar. 3, 1901, 31 Stat. 1389, c. 854, sec. 1268; June 30, 1902, 32 Stat. 542, c. 1329).

Title 22, Sec. 24, D. C. CODE (1929):

> Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority (Mar. 3, 1901, 31 Stat. 1399, ch. 854 § 1327).

SUMMARY OF ARGUMENT

I

The doctrine of equitable estoppel is inapplicable as a defense on behalf of appellants under the facts in this case. This doctrine is based upon the principles applicable in the law of negligence and is applied where, in the transaction itself or the matter in dispute, one party has led the other to act by reason of his negligence, or has made a representation of fact which he is thereafter estopped from denying. The Government made no representation to defendants. They acted on their own responsibility, and represented to the United States that the checks bore genuine endorsements. Because of this representation and the reliance placed by the United States upon it the forgeries occurred. The United States owed no duty of care to the appellant banks. The only duty owing was on behalf of ap-

pellants to the United States to perform the obligation of detecting the forgeries in cashing the checks, which responsibility they assumed by their warranty of genuineness of the endorsements. It was the negligence of the banks in failing to perform this duty which was the proximate cause of the loss.

II

The negligence, if any, of the United States in the issuance of the checks or in failing to discover the forgeries sooner, is not a legal defense in the present action. The negligence, if there be such, is not a violation of duty to the defendants, or the proximate cause of the loss. The proximate cause of the loss was the act of the banks in cashing the checks bearing the forged endorsements in reliance upon Stitely, the forger. The United States was entitled to rely upon the warranty of the banks and assume as a matter of law that they had performed their responsibility and satisfied themselves that the endorsements were genuine. The defendant banks in cashing the checks assumed the full responsibility for obtaining valid title and by their presentment warranted valid title to the checks in themselves and guaranteed the prior endorsements. They were not compelled to cash the checks nor asked to do so by any one other than Stitely or their prior endorser. In cashing them, they assumed the responsibility of obtaining valid title. They were not interested in nor are they now concerned with the past history of the issuance of the checks. The United States owed no duty to the defendant banks to prevent the fraudulent issuance of the checks. The banks and the United States had no relationship. They dealt at arms length in separate transactions. Each of which, though similar to others, stands on its own merits. In each, the bank, claiming to be the holder, by due endorsement of a check drawn on the United States, requested payment of it. Such a request implied a warranty by the bank that it, by genuine endorsements, is the true holder and entitled to collect the check, just as one offering to sell a chattel is held to impliedly warrant that he has a valid title and a right to sell. This being the law of a single transaction, nothing is presented to alter it when transactions are multiplied

and multiplication is not deemed material in any of the cases cited by the United States in this brief.

The authorities cited by the appellants in support of their argument are of no authority in the present case. They either represent the extreme minority in bank-depositor cases in which the depositor-drawer owes certain obligations to the bank-depositee, or cases which are clearly distinguishable upon the facts, or those falling within the principles of law prevailing in impostor cases, or cases in which checks are "bearer instruments" by reason of the drawer of the check knowing and intending the payee of the check to be fictitious. None of the cases falling within these categories are applicable here and the overwhelming weight of authority, both federal and state, support the judgments of the lower court.

III

The right of recovery of the United States is not barred by laches. The United States is not subject to the statute of limitations where, as in this case, it is the real party in interest. Likewise, the equitable doctrine of laches, which is applied in equity by analogy to the legal statute of limitations, is not applicable against the United States. In order for laches to constitute a defense in a suit of this nature, it must at least appear that the United States have knowledge of the forgeries, fail to give notice thereof to the banks and that by reason thereof prejudice the banks. Even in such a case the defense is only partial to the extent of the injury or prejudice shown. No such defense is raised by the appellants here.

ARGUMENT

I

The doctrine of equitable estoppel may not be invoked by the defendants under the facts in this case

In order to avoid confusion in dealing with the question here presented, it is important to keep in mind the position and relation of the plaintiff, the United States, to the defendant banks. The liability and the defenses which may properly be interposed

in suits upon forged instruments differ in the cases in which the relationship of the parties is that of bank and depositor, in cases in which the drawer's signature to a check is forged, in cases in which commercial paper is fabricated in its entirety and accepted by the drawee thereof as genuine, in cases where checks are intentionally drawn payable to impostors, and in cases in which the checks are held to be payable to bearer. In the foregoing cases the defenses of negligence, laches and equitable estoppel, as attempted to be interposed here, may under certain circumstances be properly interposed as a defense. The present case falls within none of the foregoing categories. Here, the United States and the defendant banks had no relationship. The banks cashed the checks as volunteers for their depositors and in doing so relied solely upon the confidence they had in them.

Appellants seek to relieve themselves of liability by invoking the doctrine of equitable estoppel and negligence. As these defenses involve the same questions of law and fact, the arguments in response will of necessity be somewhat repetitious. If the doctrine of estoppel is applicable at all, it is for application against the appellants; certainly not against the United States. This doctrine is based upon the law of negligence. It is applied where in the transaction itself which is in dispute one party has led the other to act by reason of his negligence and, therefore, cannot be heard afterwards to say that a statement of facts represented did not exist. In order to create equitable estoppel, the negligence complained of to operate as an estoppel must have been the neglect of some duty owing to the party claiming the estoppel.[1]

The only transaction which is in dispute here is the transaction by which the government paid to the defendants the amount of the several checks upon the presentation of the checks bearing the warranty of the defendants as to the genuineness of the endorsements. In that transaction it was the act of the defendant banks which led the United States into the act of making the payments by representing that the endorsements were genuine. Accordingly, applying the doctrine,

---

[1] NOTE: See discussion of this doctrine in 21 C. J. 1169, 1172.

the defendant banks cannot now be said to say that the state of facts which they represented, namely, that the endorsements were genuine did not exist. It was, therefore, this act of the defendant banks which constituted the negligence in the transaction, and calls for application of the doctrine of equitable estoppel against them. As pointed out by all the courts in cases of this nature [2] there was no duty owing by the United States to the defendant banks. If it is considered that the Government was negligent in issuing the checks by reason of its failure to have in effect an accounting system which would have prevented the ingenuity of Stitely from fraudulently obtaining the checks, such negligence was not a failure to perform a duty owing to appellants. This question has been so authoritatively settled that it is difficult to understand how appellants can seriously contend for its application here. As stated by the Supreme Court in *United States* v. *National Exchange Bank of Providence,* 214 U. S. 302 (1908), discussed at pages 15–17 of this brief:

> The requirement by the Government of proof, for its own protection, affords no ground for the contention that as to any action taken as the result of the furnishing of such proof, the Government is estopped as to third parties from showing that the proofs furnished were false or fraudulent and that the Government was deceived thereby. To so hold would be to say that from the act of exerting a precaution against fraud there arose a presumption by which the fraud could be successfully accomplished. This would be the case if it were now held that because by forged vouchers the Government was deceived into acting, third parties had a right to rely upon the integrity of the proof and to estop the Government as though representations as to the verity of such proof had been made by it to such third parties. The rights, therefore, of the bank as the apparent acquirer of the pension checks are to be governed by the nature and character of the instruments and cannot be enlarged so as to relieve the bank from the obligation of warranty

[2] NOTE: See cases cited at pages 15 to 32 of this brief.

implied in the presentation of the checks and the collecting of the amount.

It is contended that since the issuance of the checks continued for a period of more than four years and that Stitely came to the defendant, Washington Loan & Trust Company, and presented the checks, either for deposit or cashing the same, that the bank believed and had a right to believe that the endorsement of the payee was genuine. This argument has no basis either in law or in fact. The law places the absolute duty and responsibility upon the bank to satisfy itself that the payee's signature is genuine. This obligation, the defendant bank failed to perform. The drawee, namely, the United States is authorized to assume that the bank has performed its duty. The checks were continued to be cashed for the banks because the government was relying upon the warranty of the banks and the assumption that they were performing their duty imposed upon them by law. *United States* v. *National Exchange Bank of Providence, supra; Insurance Company of North America* v. *Fourth National Bank of Atlanta,* 12 F. (2d) 100 D. C. N. D., Georgia (1926) discussed at pages 18–20 of this brief; *New York* v. *Bronx County & Trust Co.,* 261 N. Y. 64, 184 N. E. 495 (1933), rehearing denied without opinion, 261 N. Y. 622, 185 N. E. 565, discussed at pages 21–22 of this brief.

It is also argued that since the President of the United States called upon the banks to cooperate with the government in cashing checks that this in some undisclosed manner was considered by the banks as a mandate which they felt obligated to comply with to the extent of relieving the banks of their legal obligation to satisfy themselves that the payees' signatures on the several checks were genuine. All that was meant or intended by the President of the United States was a request that the banks cooperate in cashing of government checks, upon proper identification to the bank of the payee, and a performance by the bank of its legal duty and responsibility. Certainly, it did not constitute a representation by the government that any one other than the named payee could endorse the check, and if there were no such person, the check was incapable of endorsement. The law placed and continues to place the responsibility for ascertaining these facts upon the party cashing

the check, and the banks cannot excuse their neglect of this responsibility by contending they acted on the assumption that the checks bore genuine endorsements because they were requested to cooperate in cashing Government checks. *Jordan Marsh Co.* v. *National Shawmut Bank,* 201 Mass. 397, 87 N. E. 740 (1909), discussed at pages 26–27 of this brief.

II

Negligence in the issuance of checks or in failing to discover the forgeries sooner is not a legal defense in the present action

It may be conceded that, where the Government deals in commercial paper, its rights and liabilities are to be governed as that of any private individual or corporation. However, negligence in the issuance of checks or negligence in failing to discover forgeries is not a defense that the defendants in this action may complain of, as, in any event, such negligence, if there be such, is not a violation of duty to the defendants, or the proximate cause of the loss. If the United States owes no duty of care to the defendant banks, there can be no negligence, for, to constitute negligence, there must be an existing duty owing by one party to the other.

At the common-law merchant and under Code of Law, District of Columbia, 1929, Title 22, Section 24, a forged signature is inoperative and gives no right to enforce payment against any party to the instrument unless the party against whom enforcement is sought is precluded from asserting the forgery. Under this Section by the overwhelming weight of authority the drawer of a check owes no duty to a prospective purchaser or drawee of the check other than to refrain from making a representation concerning an endorsement upon which a cashing party relies in purchasing the check. A drawer is precluded or estopped from asserting a forged endorsement only if his negligence was such as amounted to a representation as to the ownership, made to and inducing payment by the purchaser. Mere negligence in the issuance of a check which does not amount to a representation as to the genuineness of an endorsement will not, under the great weight of authority, pre-

clude assertion of forgery of an endorsement. The proximate cause of the loss, in the absence of representation as to the genuineness of the payee's endorsement, is not negligence in issuing a check payable to the order of a named person, but the cashing of the check on an endorsement by a person who is not authorized to endorse it either by the maker or the terms of the instrument. Thus, in *National Metropolitan Bank* v. *Realty Appraisal & Title Co.*, 60 App. D. C. 87, 47 F. (2d) 982 (1931) this Court said:

> It is contended on behalf of the bank that the title company was negligent in permitting Flanagan and his dupe to impose upon the company as shown by the facts, and that this negligence resulted in the issuing of the checks in question, and placed it in the power of Flanagan to obtain payment of them by means of the forged endorsements. It is claimed accordingly that the company is not entitled to recover because of their payment.
>
> The claim is not tenable. It is doubtless true that the transactions out of which the checks were issued were handled in a negligent manner by the officers of the title company. But such negligence bore no relation to the conduct of the bank when it paid the forged checks. *When the checks were presented to the bank by Flanagan, so far as the bank was concerned, they were not affected by the previous history of the transaction, but were simply checks drawn by the title company to the order of Emelia Murray and endorsed with her name and that of Flanagan. The bank apparently accepted and paid them upon the faith which it had in its depositor* and made no inquiry concerning the genuineness of the prior endorsement thereon of Emelia Murray's name. *In this the paying bank was itself negligent, and it was this negligence which led to the present loss* and imposes liability for it upon the bank.[3]

[3] NOTE: This Court followd the latter decision in *The City Bank* v. *Hamilton National Bank*, 71 App. D. C. 225, 108 F (2d) 588 (1939), and it would appear that the foregoing cases have definitely decided the principle of law applicable here. This is true whether the rights and liabilities of the parties are to be determined according to the law of the District of Columbia, where the checks

Where the payee of a check is fictitious and the drawer is unaware of the payee's character, believing that the payee is a person in existence, the same principles are applicable. Unless the drawer makes a representation to the depositary upon which the check is drawn or to the cashing volunteer as to the genuineness of the payee's endorsement, title to the check does not pass and the unauthorized endorsement gives no right to the depositary to charge the drawer's account, or right to the cashing volunteer to enforce payment. The risk of purchasing or paying upon a genuine endorsement is upon the volunteer or drawee to whom the drawer's only duty is to refrain from an affirmative representation concerning ownership of the check. (*Robertson Bkg. Co.* v. *Brasfield*, 202 Ala. 167, 79 So. 651 (1918); *Jordan Marsh Co.* v. *National Shawmut Bank, supra; Com.* v. *Globe Indemnity Company*, 323 Pa. 261 (1936); *Farmers' State Bank in Merkel* v. *United States*, 62 F. (2d) 178 (C. C. A. 5, 1932); *Continental Nat. Bank & Trust Co.* v. *Olney Nat. Bank*, 33 F. (2d) 437 (C. C. A. 7, 1929).) While it is true that the drawer admits the existence of the payee and his capacity to endorse, he does not admit that the payee will endorse or has in fact endorsed. (*Robertson Bkg. Co.* v. *Brasfield*, 202 Ala. 167, 79 So. 651 (1918); *American Exp. Co.* v. *People's Sav. Bank*, 192 Iowa 366, 181 N. W. 702 (1921); *Ocean Accident and Guarantee Corporation* v. *Lincoln National Bank*, 112 N. J. L. 550, 172 N. E. 45 (1934).) It follows that if the payee is fictitious and the drawer was unaware of the fiction, in the absence of a representation as to ownership, title to the check simply cannot pass at all.

> The first proposition presented in appellant's brief is: "The checks when put in circulation by the Commonwealth were not susceptible of genuine endorse-

---

were delivered and negotiated, *United States* v. *Guaranty Trust Company of New York*, 293 U. S. 340, 346 (1934), or according to "federal law," *United States* v. *Clearfield Trust Co. et al.*, C. C. A. 3, July 29, 1942 (Unreported). The fact that the present case involves many more checks than involved in the District of Columbia cases should not alter the rule, and has not been considered to alter it when the transactions were multiplied. *United States* v. *National Exchange Bank of Providence, supra; Insurance Company of North America* v. *Fourth National Bank of Atlanta, supra; Jordan Marsh Co.* v. *National Shawmut Bank, supra; United States Storage Company* v. *Central, etc., Bank*, 343 Ill. 503, 175 N. E. 825 (1931).

ment." The record shows conclusively that that proposition is sound and, as the Commonwealth did not intend to make the checks payable to any identified person regardless of name, or to fictitious or nonexistent person, appellant's proposition would seem to end its case. (*Com.* v. *Globe Indemnity Co.*, 323 Pa. 261, 266, 267 (1936).)

Thus, in Brannan's Negotiable Instruments Law, 6th Ed., p. 223, it is said:

> But when a maker believes that the payee is a real person, even if his signing and putting into circulation the instrument payable to a fictitious or nonexisting payee is held to be an admission that the payee is a real person, this does not show that the maker expects and intends the instrument to pass as if made to bearer. Quite the contrary, he intends it to pass only by indorsement, and if there is no such person as the payee it simply cannot pass at all. Any other rule is illogical and unjust, for the person taking an instrument purporting to be payable to a person without indorsement is not entitled to consideration, and if it is endorsed by someone in the name of the fictitious or nonexisting person the loss to the buyer of such an instrument is not due to the fact that the payee is fictitious or nonexisting, but to the fact that the instrument is endorsed by someone who is not authorized to endorse it, either by the maker or by the terms of the instrument, and the endorsee is in such a case no worse off than in the case of the forgery of the indorsement of the name of a real person.

The foregoing principles apply with greater force in a case where a check is cashed by a volunteer, a stranger to the drawer, than where the check is paid by the depositary on which it is drawn, although under the authorities the principles are applicable to both cases. A depositary on which a check is drawn owes the drawer a duty to honor his checks under certain circumstances; and the drawer, as an incident of the depositor-depositary relationship, owes his bank the duty of examining returned vouchers and reporting inaccuracies promptly. But

these duties do not exist where there is no relationship, contractual or otherwise, between the drawer and the person cashing a check. The latter is under no obligation or compulsion to cash the check and, in the absence of a representation by the drawer as to the ownership of the negotiator, the purchaser should and does assume the risk that the negotiator has a title to convey. *The manner in which the check comes into existence is immaterial, so long as after the check is in circulation the drawer makes no representation as to the title of the purported owner.*

Applying the foregoing principles to the case at bar, it is clear that whether there was negligence in the issuance of the checks or whether the checks were payable to fictitious persons, is immaterial. The defendant and its endorsers were not the depositaries on which the checks were drawn. The Government at no time made any representation to the defendant or its endorsers as to the ownership of the checks and therefore, the defendant and its endorsers assumed the risk of their negotiator's title. In delivering the checks to Stitely, who was was highly regarded in the National Park Service, for delivery to the payees, the Disbursing Officer was entitled to rely upon his honesty and to assume that the checks would be delivered to the payees or, if the payees could not be found, returned to the Government. It was not required to suppose that a trusted employee would divert from his duty and employment and steal the checks. The Government was also justified in relying upon the vigilance of banks in detecting forged endorsements, notwithstanding any error or omission in the series of events leading to the issuance of the checks. Neither the Disbursing Officer nor the certifying and approving officers had authority to identify to anyone, on behalf of the Government, who was the payee of the checks; and neither purported to make any such representation. And the defendant and its endorsers knew nothing of the series of events leading to the issuance of the checks, made no inquiry concerning Stitely's title to any of the great number of checks presented by him which were payable to other persons—although suspicion should have been aroused. Plainly the defendant and its endorsers were content to purchase the checks in complete

reliance upon the warranties implied *by his personal endorsement,* and not in reliance upon any guaranty by the Government other than that the check would be paid to one holding it upon the genuine endorsement of the payee.

Similarly, it is immaterial whether or not the fraud could have been discovered by constant and more careful check and comparison of pay rolls, ledgers, accounts, books, etc. Even assuming that the fraud could have been so detected, it could be inferred at most that there was negligence in drawing checks payable to order, and under the foregoing principles that would not preclude the Government from defending upon the ground that a purchaser of the check acquired it from one who was not the owner and was not invested with the indicia of ownership. Moreover, the Government owed the defendant and its endorsers no duty to make more careful and constant checks of its books and records to ascertain whether a fraud was being perpetrated of which it had no suspicion. When checks were presented by third persons, the Government was justified in relying upon their guaranty of prior endorsements and was not itself required to make an investigation which might have prevented future breaches of guaranty.

The precise situation in the case at bar—the issuance by an employer of a series of checks at the instance of a dishonest employee submitting over a period of years demands and invoices in favor of fictitious or nonexisting persons has arisen in a great number of cases in many jurisdictions. In most instances the employer was a private individual or corporation, in some a state or municipality, and in others the United States Government. In some of the cases the employee's frauds continued over as long a period of time as in the instant case and involved as large or a greater sum. In many of the cases the employer had rather elaborate systems of approving, checking, and entering demands before checks were drawn to pay them, systems similar to that of the United States Government; and officers of the companies signed checks without personal investigation to determine whether the demands were fraudulent or not, relying on the initials of heads of departments and on the regularity of the requisitions upon their face. Unanimously the decisions hold that such conduct, which prevails in every

large corporation, is not negligence and that in any event, it is not a violation of duty to a cashing volunteer or even to a drawee-depositary. The decisions hold also that even though the fraud might have been detected sooner by the employer by more careful and constant checks of invoices, pay rolls, accounts, vouchers, etc., the failure to do so is no breach of duty to a cashing volunteer who was himself under the duty of investigating the genuineness of the endorsement of the payee, with which matter the drawer had nothing to do. The drawer's system of guarding against false or erroneous demands is for his own protection and the fact that he uses precautions for his benefit does not entitle a stranger to say that the precautions did not work properly or were not sufficiently effective, especially where the ineffectiveness did not interfere with the stranger's performance of his duty.

A. Decisions involving the United States Government and rendered by the Supreme Court of the United States and the Circuit Courts of Appeals of the United States

In *United States* v. *National Exchange Bank of Providence, supra,* an action was brought by the United States to recover the sum of payments made at the subtreasury of the United States in Boston, upon 194 pension checks issued during the period 1892 to 1897. The checks were issued in consequence of fraudulent vouchers submitted in regular form, purporting to be executed by persons entitled to payment as pensioners, but which in fact were forgeries. Relying upon the apparent validity of the vouchers, the United States pension agent drew the checks in question in favor of the persons named on the vouchers, and transmitted the same by mail to the addresses of each pensioner as given in the voucher. Of the persons named, fifteen were dead, and all of the others were persons who had no right to receive the pensions. The checks were obtained by one William A. Munson, who forged the endorsement of the named payees and the checks later came into the hands of the defendant bank, who presented them to the subtreasury and received payment therefor. The facts are identical with the present case, except that the forger is not shown to have been an employee of the United States. The

forgeries were detected during the period June 18, 1897, to December 1898. The defendant bank was notified of the forgery July 22, 1898, and the suit commenced August 27, 1901. The United States sued in two counts; an indebtedness of the defendant bank to the United States was averred in the first count, upon the warranty of endorsement by the bank in presenting and collecting the checks. The second count was the common count for money received by the defendant to the use of the United States. The complaint in the present action is drawn in a similar manner. In substance, the defenses interposed in the answer of the bank were that, if the facts averred in the declaration were established by proof, the bank was not liable because the action had not been brought within a reasonable time after the alleged payments of the drafts, nor had prompt notice been given of the discovery of the forgeries. It was also averred that the United States had been negligent in not verifying the signatures of the payees of the checks in suit by comparing them with signatures of the payees in its possession. The Supreme Court directed that judgment be entered for the United States, against the bank. In the course of the opinion, the Court stated that negligence in the issuance of the checks or in discovery of the fraud was not a defense which the bank may interpose; that there was no duty owing by the United States to the bank; and that the governmental requirements for the issuance of the checks, the identification of the payees, and the like are for the protection of the United States, and that their insufficiency in preventing fraud or failure of Government officials to comply with said requirements in the issuance of checks affords no ground for the defendant bank to complain of. Quoting from the case of *White* v. *Continental Nat. Bank,* 64 N. Y. 316, the Court says, at page 319:

> As the nature of the forgery did not cause the case to be controlled by the exceptional rule, and as the Exchange Bank when it presented the checks and obtained thereon the money of the United States by operation of law warranted the genuineness of the instruments which it thus presented and upon which it asked and received payment, it follows that the case in substance is accu-

rately portrayed in observations made by the Court of Appeals of New York in the *White case,* at pages 320–321:

"The facts which disentitled the defendant to receive the money, and in ignorance of which it was paid, were those presumed to be within the knowledge of the defendant and not of the plaintiffs. The defendant, in receiving the money and in disposing of it, did not act upon the faith of any admission by the plaintiffs, express or implied, of any fact which they now controvert in prosecuting this action. There was, therefore, no want of good faith, no negligence, or even want of ordinary care on the part of the plaintiffs in the payment of the money. The defendant, in the entire transaction, acted upon other evidence of its right to the money than the statement or actions of the plaintiffs, and in dealing with the bill and with the money, its avails, acted upon the apparent title and genuineness of the instrument, and the responsibility of those from and through whom it received the bill. The plaintiffs, therefore, owed no duty to the defendant in respect to the forgery, which invalidated the bill and its title to the moneys represented by it."

Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged indorsement having been broken at the time the checks were cashed by the United States, and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which by the operation of the legal warranty were presumably within the knowledge of the defendant.

In *Farmers' State Bank in Merkel* v. *United States, supra,* one Grimes, commanding officer of a Field Artillery Combat Train, submitted false and fraudulent pay rolls to the disbursing officer, who issued checks payable to the employees named, in ignorance of the fraud. The Government was held entitled to

recover its payments on the checks from the successor of the cashing bank, which acquired them on endorsement by Grimes. The Court said:

> The money, having been paid on the faith of the bank's warranties, by its indorsements, of the genuineness of the forged indorsements of the name of the payee, was received by the bank for the use of the appellee. The appellee's right to recover the money was not impaired by the use of it in a way not consented to or approved by it.

In *United States* v. *National Bank of Commerce,* 205 Fed. 433 (C. C. A. 9, 1913) (certiorari denied 241 U. S. 658), one McCoy, an examiner of public surveys and special disbursing agent for the Government, falsified reports to the Government during 1907, 1908, and part of 1909, and drew checks issued in favor of fictitious persons for work which had not been performed. The Government was held entitled to recover the amount of checks totalling $15,129.81 paid by the defendant on endorsements forged by McCoy. In regard to the claim that the Government was negligent in not discovering McCoy's frauds sooner, the Court said (in reversing a judgment for the bank):

> The defendant contends it [judgment below for defendant bank] may be sustained on the ground of the plaintiff's negligence in not discovering the frauds of McCoy sooner than it did. * * * In the absence of knowledge to the contrary, the government had the right to rely upon the assumption that the defendant depositary of public money would do its duty, and there was nothing in the case to indicate that its reliance was misplaced until it discovered McCoy's frauds.

The case of *Insurance Company of North America* v. *Fourth National Bank of Atlanta, supra,* is a thoroughly reasoned opinion by the learned district judge who considers all of the issues raised by the defendant in the present case, and although the United States was not involved as a party to the suit, as the principles of law involved are applicable and controlling, the Court's attention is respectfully invited to this decision. The

plaintiff insurance company, between February 1918 and September 1922, issued a great number of drafts on itself for a large aggregate amount payable to named persons who were fictitious, as they had no right or interest in the checks and were not entitled to payment. In September 1922, it was discovered by the insurance company that each payee's endorsement was a forgery, and promptly thereafter demand was made on the bank for repayment of the entire sum, as money had and received in one count, and as damages for breach of an implied warranty of title and right to collect the drafts in a second count. The Court said that responsibility for detecting the forgeries was originally, and continues to be, on the banker and those with whom he deals.

> * * * This bank and insurance company had no relationship. They dealt at arm's length, in separate transactions, each of which, though similar to others, stands on its own merits. In each the bank, claiming to be the holder, by due indorsement, of a draft on the insurance company, drawn by the insurance company's manager, requested payment of it. Such a request implies a warranty by the bank that it, by genuine indorsements, is the true holder and entitled to collect the draft, just as one offering to sell a chattel is held to impliedly warrant that he has a valid title and a right to sell. (*White* v. *Continental National Bank*, 64 N. Y. 316, 21 Am. Rep. 612; *Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U. S. 26, 35, 9 S. Ct. 302, 32 L. ed. 342; *United States* v. *National Exchange Bank*, 214 U. S. 302, 320, 29 S. Ct. 665, 53 L. ed. 1006, 16 Enn. Cas. 1184.) A payment made is on the faith of the correctness of the implied representation.
>
> The insurance company, before paying here, was bound to recognize the signature of its manager, and to verify the amount for which it had issued its draft, and the failure to recognize alterations in its own paper may be held to be an adoption of it in its altered form. (*United States Bank* v. *Bank of Georgia*, 10 Wheat. 332, 345, 6 L. ed. 334; *Cooke* v. *United States*, 91 U. S. 389, 396, 23 L. ed. 237.) But it was not bound to question

> or verify the indorsements constituting the bank's title and authority to collect. For the indorsements, the holder of a draft is responsible to the drawee, and the drawee is not assumed to have, and generally has not, superior or even equal means of knowledge. There being no duty of inquiry put on the drawee by law or custom, failure to note a forgery in the indorsements cannot be negligence in him. * * *
>
> It has been held that, if the drawer himself delivers the draft to an imposter, who pretends to be the named payee, and who accordingly indorses and collects (*Land Title & Trust Co.* v. *Northwestern National Bank,* 211 Pa. 211, 60 A. 723, 107 Am. St. Rep. 565), or where the drawer by mistake mails the draft to the wrong address, where it falls into the hands of another person having the payee's name, who indorses and collects (cases cited) then it is the drawer's loss. In such cases it was the drawer's own act that invited and caused the forgery. In the first case the identical person got the money who was intended by the drawer when he gave him the draft, and in the second class of cases no diligence by the bank could have determined that the payee intended was not the person of that name to whom the drawer had in fact, though unintentionally, delivered the draft.

See also: *Fulton National Bank of Atlanta* v. *United States,* 107 F. (2d) 86 (C. C. A. 5th Cir., 1939); *Ladd & Tilton Bank* v. *United States,* 30 F. (2d) 334 (C. C. A. 9th Cir., 1929); 43 F. (2d) 665 (C. C. A. 9th Cir., 1930).

B. Decisions involving states or municipalities

In *Com.* v. *Globe Indemnity Company,* 323 Pa. 261, 185 A. 796 (1936) a clerk in a Department of the Commonwealth of Pennsylvania handling claims for condemnation of tubercular cattle, fabricated papers showing amounts due to various fictitious persons. He placed the false papers with valid records, and the fraud was not discovered by the auditor general or state treasurer or any other official as the records moved from the department of origin to fiscal officers who drew checks. The fraud continued for a year and one-half. Concerning the charge that

the Commonwealth was guilty of negligence contributing to payment of the checks, the Court, in holding that the Commonwealth should recover the amounts of the checks paid by the defendant bank, said:

> If the checks were not susceptible of indorsement and the bank nevertheless made payment, it could not debit the drawer's account. * * * It also follows that if the checks were not susceptible of indorsement, drawing and mailing them to the addresses, as stated above, could not be the proximate cause of the payment made by the bank. The drawer could not have anticipated that, after they were drawn and mailed, Thomas and his confederate would by misrepresentation get them from the mails and that the bank would honor them. The most ordinary precautions usually expected to be taken by a banker * * * asked to cash or credit the checks would, if taken, have at once disclosed that the holder had no title. *It is immaterial that the fraud was initiated by an employee of the Commonwealth* (citations). It is also immaterial that before the discovery of the fraud, the Commonwealth knew that its account had been debited by the bank from time to time with the amount of those checks. The bank must know the drawer's signature, but generally it takes the risk of the payee's indorsement; with that the drawer has nothing to do unless he makes some representation with regard to it, and none was made here.

In *New York* v. *Bronx County Trust, supra,* checks were issued by the City of New York payable to fictitious city employees whose names had, as part of a conspiracy among employees, been fraudulently placed on the records and pay rolls of a garage operated by the Department of Street Cleaning of the City of New York. The pay rolls were certified by the garage manager or by the superintendent of the district in which the garage was located. Concerning the charge of the bank that there was negligence in the issuance of the check, the Court in granting the City recovery of the amounts of 652 checks paid by the defendant bank, said:

> So far as the evidence shows, no facts came to the city's knowledge as in *Prudential Ins. Co.* v. *National Bank of Commerce* (227 N. Y. 510), to put it upon inquiry. Lacking such warning it had a right to rely upon the vigilance of the banks in detecting forged endorsements. Nor can it be justly said that there was negligence in the issuance and delivery of the checks. No fault is or can be found with the system of payment used by the city. It provided for careful and detailed records of the work done by all employees at the garage, and it required the pay rolls made up from those records to be separately certified by two responsible officials. * * * True it is perhaps that if there had been other officials to watch those whose duty it was to watch, discovery might sooner have been made. But the city was not bound to anticipate a conspiracy among its trusted employees (*Peoples Trust Co.* v. *Smith*, 215 N. Y. 488); nor did it, as a depositor, owe the duty of such extraordinary vigilance even to the plaintiff drawee, much less to the defendants.

The judgment rendered by the trial court for the defendants was reversed and entered for the City. On the authority of this case the Government would be entitled to recover in the case at bar even if the other employees, e. g., officers approving or certifying pay-roll vouchers forged by Stitely, had acted in collusion with him. Certainly, therefore, the mere failure by other employees, negligent or not, to discover the fraud sooner does not prevent recovery.

In *City of St. Paul* v. *Merchants Nat. Bank*, 151 Minn. 485, 187 N. W. 516 (1922), where a person employed as chief clerk in the Department of Public Works for the City of Minneapolis and whose duty it was to make out time slips for employees, made out fictitious time slips for men not employed, and so procured checks payable to the persons without interest in the proceeds, a directed verdict for the City for $8,313.81, paid out by the defendant on endorsements forged by the employee over a period of four years was sustained. It was held that the City was not estopped; that the payment by the bank which

had the opportunity of requiring identification or a responsible guaranty, was the proximate cause of the loss.

In *Board of Education* v. *National Union Bank,* 121 N. J. L. 177, 1 A. (2) 383 (1938), aff'd 16 N. J. Misc. 50, 196 A. 352 (1935), the plaintiff Board of Education of the Township of Jefferson, New Jersey, was a depositor in the defendant bank. The president and the clerk of the board entered into a conspiracy by which 83 school board checks were issued between August 1933 and February 1937, in favor of fictitious individuals, but regularly deposited in the bank usually to the personal credit of the clerk, upon forged endorsements of the payee. It was held that the negligence of persons employed by municipal corporations as public servants charged with a pubic duty was not imputable to the employer. And in granting the City recovery for the amounts of all the checks, the Court said:

> It is not possible, upon the facts of this case, to invoke the doctrine of estoppel. When the vouchers were returned to Mrs. Robinson, she looked them over. She did not examine the endorsements. Her failure so to do cannot estop the board of education from complaining of the improper charging to its account of the drafts containing forged drawee [payee?] signatures. Kolar had no authority to divert the school moneys to his own account. The bank knew this and it was charged with a duty to scrutinize the endorsements by which it obtained title. *It cannot be heard to say that because it was derelict in its duty the negligence of an employee of the board in not conducting a thorough audit each time the vouchers were returned can preclude a recovery.*

C. Decisions involving private individuals or corporations

In *Los Angeles Invest. Co.* v. *Home Sav. Bank,* 180 Cal. 601 (1919), one Emory, the manager of the plaintiff's department for soliciting fire insurance, beginning in February 1914 and ending September 1915, prepared about twenty demands or requisitions against the company for checks in payment of nonexistent claims. Either a fictitious name was used, or the name of a person known to him but who had nothing to do with the matter. The requisitions were approved by the ac-

counting department and entered on the plaintiff's books. Thereafter checks were signed by authorized officers in payment of the demands, and returned to Emory for delivery to the ostensible payees. Emory forged the payees' endorsements, then endorsed his own name and secured payment by direct presentation to the defendant or through other banks. It was held that the company was entitled to recover from the depositary the amount of the checks. Concerning whether the company was negligent, the Court said:

> As to the third defense, that the plaintiff was guilty of negligence which induced or contributed to the payment of the checks by the bank, the only negligence claimed is in the officers of the plaintiff signing the checks on the false demands or requisitions of Emory, and in the failure to discover the forgeries more promptly. The lower court found such negligence, and it is urged upon us that the question being one of fact is concluded on appeal by such finding. This is not true, of course, if there is no conflict in the evidence (and there is none), and the conclusion of negligence is one which cannot reasonably be drawn from the probative facts put in evidence. We are much inclined to the opinion that negligence cannot be reasonably inferred from the probative facts in this case. The company had rather an elaborate system of approving, checking, and entering demands before checks were drawn to pay them. It was, as we have said, very similar to the systems found in other corporations. Complaint is chiefly made that the company relied on the honesty of its heads of departments and the regularity on their face of the demands or requisitions which such heads approved, and made no investigation to determine whether such demands were fraudulent or not. But trust must be placed in someone (citations) and necessarily in heads of departments. If trusting them in regard to demands for checks for disbursements regular upon their face is negligence, so it would be negligence to trust them in a hundred other ways in which it is within their power to defraud their employer. Business could not be conducted on any

such basis. It is impossible for any large concern to investigate minutely in advance every demand for disbursement necessary for it to make in its daily business. The delay and expense of so doing would be too great.

And on the question of proximate cause the Court said:

> But however this may be, *even if the company were guilty of negligence in signing the checks upon the fraudulent demands of Emory, it is plain that such negligence did not contribute to or induce the acceptance by the banks of the forged indorsements. The forgery of the indorsements was entirely distinct from the issuance of the checks on false demands, and there is no relation between them.* This is clearly shown by the fact that Emory could just as easily have forged indorsements on and secured the payment of checks issued on genuine demands, and in fact did so in one instance.

The Court said further:

> The other particular in which it is claimed that the plaintiff was negligent is, as we have said, that the plaintiff did not examine more carefully the cancelled checks as they were returned to it, and discover the forgeries earlier. The plaintiff did make some examination of the returned checks to see that the indorsements were regular. But a depositor is not bound to examine the indorsements on returned checks. He is bound within a reasonable time to ascertain the genuineness of the checks themselves (citation), but as to endorsements, the rule and its reason are correctly stated in *Shipman* v. *Bank* (126 N. Y. 318), supra:
>
> "The defendant's contract was to pay the checks only upon a genuine indorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The bank must, at its own peril, determine that question. It has the opportunity, by requiring identification when the check is presented, or a responsible guaranty from the party presenting it, of ascertaining whether the indorsement is genuine or not. When it returns the check to the depositor, as evidence

> of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine."

In the leading case of *Jordan Marsh Co.* v. *National Shawmut Bank, supra,* one Keefe, a "Claim and Returned Goods Clerk," prepared fraudulent bills purporting to represent purchases of goods, and forged the signature of heads of departments evidencing the purchase of the goods. He forged also the signature or initial of a director of the firm to the bill, and caused the bill to be entered in the stock book of the indicated Department. In this manner he procured checks payable to persons who were fictitious or had no interest in the proceeds. A total of 170 checks aggregating more than $50,000 were obtained, and *the frauds continued from November 1889 to early in 1905. It appeared also that the plaintiff's employees acted contrary to its regulations and that* if they had performed their duties the fraud would have been discovered at the outset. In actions to recover money paid ($15,684.20) on 42 endorsements forged by Keefe, the Court, holding for the plaintiff company, said at page 407:

> If one is fraudulently induced to deliver to a person who is not entitled to it a check made payable to another person who is not entitled to payment of it, can his negligence in suffering the fraud to be practiced upon him be found to be a direct and proximate cause of a payment made by the banker upon whom the check is drawn, upon a forged indorsement of the name of the payee, without any investigation by the banker as to the genuineness of the indorsement? We think not. The check is like any other check payable to a real person which happens to be in the possession of another person. It is possible to forge an indorsement upon it, as it is to forge an indorsement upon any other check. Perhaps the circumstances make a speedy detection of such a forgery less probable than in ordinary cases. But the whole duty of seeing whether there is a forgery of such an indorsement upon any check rests primarily upon the banker. The drawer of the check has nothing to do

with that. Ordinarily he makes no representation that has any relation to it. In the case just supposed he made no representation in regard to it. The checks payable to the order of A. L. Sefton, which she did not endorse, were wrongly paid; and the defendant's liability for payment is like that for the payment of any other check bearing such a forged indorsement. The plaintiff had nothing to do with the payment, or with the defendant's performance or nonperformance of its duty to see that payment was made to the right person.

* * * * *

The question arises whether the making of a check payable to a fictitious or nonexisting person, through negligent failure to discover the fraud by which the check is obtained, stands differently from making a check to an actual person, in reference to its effect upon payment by the defendant. We are of the opinion that there is no difference in law. In either case it is the duty of the bank to see that there is a genuine indorsement.

The Court said further:

It is very generally, if not universally, held that this duty of a depositor (to examine accounts rendered by bank reasonably to see whether they were correct) does not extend to an examination of the signatures of the payees of the checks, for he is not expected to know them, and the banker is expected to see that the payments are properly made (citations).

In *Shipman et al.* v. *Bank* (S. N. Y.) 126 N. Y. 318, 27 N. E. 371 (1891), one Bedell, a trusted lawyer, was in charge of the real estate department of the plaintiffs, a firm of New York lawyers. The Department examined titles, made loans on bonds and mortgages, and purchased real estate for clients. Bedell received money from clients of the firm and deposited it with the defendant bank. The bank account was kept by one Dodge who filled out all checks, and made all the entries in the check books, and the checks, when paid by the defendant, came to him with the passbook, which was balanced by the defendant, and the vouchers, returned with the book from time

to time at frequent intervals. The plaintiff's client, who wished to make a loan, furnished money which went directly to the plaintiff's bank account with defendant. Against the sum to be loaned checks were filled up by Dodge from a written statement made by Bedell, showing the amount required to pay liens and charges, and the balance to be paid to the borrower. After filling up the checks, Dodge would take them to a member of the firm for signature, showing him the entries in the check book of the deposit of the client's money, and the statement of Bedell. When the check was signed, Dodge delivered it to Bedell. In this manner Bedell obtained 27 checks over a period of more than four years, aggregating about $200,000, some of which were payable to fictitious borrowers and others to real persons who had nothing to do with the matter. It was held that the plaintiffs could recover the total amount of the checks, paid out by the defendant on endorsements forged by Bedell. The Court said:

> It is urged that plaintiffs owed the duty to defendant of examining the vouchers returned to them with the balanced passbook from time to time, and that a careful examination of the same would have disclosed the fact that the money was received upon the checks by Bedell and his forgeries thus detected. The duty of examining the returned vouchers was delegated by the plaintiffs to their cashier and bookkeeper, who was a faithful and competent person for many years in the plaintiffs' employ. The referee found as a fact, from all the circumstances of the case, that the failure to discover the forgeries sooner than they were was not, in any case, caused by *any neglect on the part of the plaintiffs or their cashier, of any duty that the plaintiffs owed to the defendant.* The examination of the checks would, of course, enable the plaintiffs to ascertain whether their own signature was as genuine * * *, but would not necessarily enable them to detect the forgery of the payee's name. The law imposed no duty upon the plaintiffs to do more than they did to ascertain whether the indorsements on the checks were genuine. * * *

> The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The bank must, at its own peril determine that question. * * * We are unable to see that anything was done or omitted by the plaintiffs with respect to the examination of the indorsements upon the vouchers that excuses the defendant from its obligation to pay upon a genuine order only. Nor can we perceive anything done or omitted by the plaintiffs in the general conduct and management of their business, or in the employment of and confidence reposed in Bedell that estops them from alleging that the twenty-seven checks were paid w i t h o u t their authority.

The Court also said:

> The indorsement of the names of fictitious payees upon the checks, with intent to deceive and to put the checks in circulation, constituted the crime of forgery by means of which, and without any fault of plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged.

Similar to these cases from California, Massachusetts, and New York is the case of *United States Storage Co.* v. *Central, etc. Bank*, 343 Ill. 503, 175 N. E. 825 (1931), where 50 checks, aggregating more than $6,000, were obtained on false demands in favor of customers of the plaintiff to whom the plaintiff was not indebted, by the plaintiff's chief clerk whose duty it was to prepare vouchers and to initial proper demands, and thereafter to present the vouchers, initialed also by the head of the proper department, to an officer of the plaintiff with a check for signature. The signing officers knew nothing about the voucher or the consideration for it except what appeared on its face. It was held that the plaintiff could recover from the defendant the amount of the checks which the defendant had paid and which the plaintiff's clerk had cashed through other banks on forged endorsements, after the checks had been

delivered to him for delivery to the payees. The Court relied on *Jordan Marsh Co.* v. *National Shawmut Bank, Shipman* v. *Bank of the State of New York,* and *Los Angeles Investment Co.* v. *Home Savings Bank, supra,* as well as upon other decisions. The Court said:

> Nor does he owe the duty to his banker to employ none but honest clerks who will not steal his checks and commit forgeries by means of them. When he has drawn his check payable to the order of the payee named he owes the drawee no other duty, and the risk of the authenticity of the indorsement on which the drawee pays the check is that of the drawee.

In *The Grand Lodge of A. O. U. W.* v. *State Bank of Winfield,* 92 Kans. 876, 142 Pa. 74 (1914) it appeared that one Mishler, the financier of a local lodge, procured a series of checks from the grand lodge by representing that a member of the lodge had died. To consummate the fraud, which continued over a period of two years, he was obliged to forge the signature of the master workman and recorder of the local lodge to a notice of death; and to forge signatures to a proof of death, and to a report of death purporting to be signed by local officers. It appeared that an examination of Mishler's books would have disclosed that, notwithstanding he reported the members dead, he regularly entered payment of their dues. Also a bylaw of the lodge provided for an examination and audit of his books semiannually. However, the examiners did not audit his books but accepted his statements, which did not reveal payment of the dues. Concerning the charge that the lodge was negligent in not detecting the forgeries sooner, the Court, reversing a jury verdict for the defendant, said at page 884:

> No statements or reports showing the prior forgeries were received by the grand lodge. The reports regularly sent in by Mulford lodge (Mishler's local) contained no clues to the forgeries. *As between the grand lodge and its depositary we know of no rule of diligence requiring an examination of the ledger of a subordinate lodge in order to ascertain whether some officer of the*

> *latter is transacting his business honestly, in the absence of any notice or suggestion of dishonesty. Negligence cannot be imputed for failure to discover fraud which an examination migh have disclosed, unless as between the parties affected ordinary diligence required such an examination.*

And at page 888 the Court said:

> The duty of the depositary was to pay only upon the order of the payee, unless it can invoke the protection of estoppel or such negligence of the depositor as will be a sufficient defense. This negligence must relate to some duty owed to the bank. As already stated, it was not required, in the absence of any notice of information to explore the books of Mulford Lodge, which furnished the clue to Mishler's previous guilt, but might rely upon the presumption of his honesty. In the absence of notice or knowledge either to the grand lodge or the bank, the former forgeries were wholly unrelated to this transaction.

In *Welsh* v. *German American Bank*, 73 N. Y. 424 (1878), the plaintiff's bookkeeper procured checks by submitting fictitious accounts of sales of property of a customer of the plaintiff. In a suit to recover $3,164.11 paid by the defendant bank on 12 endorsements forged by the bookkeeper between April 27, 1872, and March 28, 1874, a directed verdict for the plaintiff was sustained. The Court said at page 429:

> The plaintiff had a right to assume that the bank before paying the checks would ascertain the genuineness of the indorsements. He was deceived into giving the checks by the fraud of Swindels, but this act did not affect the action of the bank, nor in a legal sense did it contribute to the fraud perpetrated upon the defendant. The fraud committed upon the plaintiff and upon the bank were independent and unconnected frauds, and the fact that the plaintiff entrusted the checks to his clerk to send to Johnson, who forged the indorsements, made him no more responsible than if he had entrusted them to an expressman to carry to Johnson, and the

> expressman had forged the name of the payee, and passed them to the defendant.

See also: *American Sash & Door Co.* v. *Commerce Trust Co.*, 332 Mo. 98, 56 S. W. (2d), 1034 (1932).

Recovery is not barred by the impostor theory

The so-called impostor cases in which a drawer draws and issues a check to an impersonator after being deceived into the belief that the impersonator is the person whom he purports to be, are inapplicable. There was no course of dealing between the Government and Stitely with reference to the checks as a result of which Stitely was accepted by authorized officers as the physical person entitled to the checks. The checks were not issued or drawn with the intention that he should receive them, but on the contrary the drawers and the Government intended only that the checks should be payable to the persons who had been certified, or purportedly certified, as entitled to payment for indicated services; and the checks which were delivered to Stitely were delivered *for delivery to the payees* and with no suspicion that he would convert them.

The impostor theory was held inapplicable in those cases in which the argument was raised. (*Grand Lodge A. O. U. W.* v. *State Bank; American Sash & Door Co.* v. *Commerce Trust Co.; Com.* v. *Globe Indemnity Co., supra.* See also *National Union F. Ins. Co.* v. *Mellon Nat. Bank*, 276 Pa. 212, 119 A. 910 (1923).)

In *Com.* v. *Globe Indemnity Co., supra,* the Court said at page 270:

> It is also obvious from what has been said that the cases of impersonation, the so-called impostor cases, do not help appellant. They depend on the drawer's intention, a test applied by the weight of authority; the drawer is precluded (section 23) by that. If a particular person is intended and designated as payee, it is immaterial to the drawer by what name he is called; he may endorse and payment to him will be good (as was decided in *Land Title & Tr. Co.* v. *Northwestern Nat. Bank,* 196 Pa. 230, 46 A. 420) because such payment accords with the drawer's intention. But if any intention

> may be attributed to the Commonwealth in drawing and mailing the checks involved in this case, it is limited by what was stated on the check and by mailing it; there was here no additional evidence of intention such as handing the check to the person intended as, for example, in *Land Title & Tr. Co.'s* case, which precluded the drawer from asserting that it intended the payee to be the person who owned the property and not the person who was present at the settlement, answering to the name of and claiming to be the owner.

And thus the case of *Land Title & Tr. Co.* v. *Northwestern Nat. Bank*, 196 Pa. 230, 46 A. 420, a leading American case on the impostor rule, was held inapplicable by the very court that decided it to facts indistinguishable from those in the case at bar.

Moreover, the impostor theory is inapplicable for the independent reason that it may be invoked only by the transferee who in good faith accepts his transferor as the intended payee. In the instant case, Stitely did not represent to the defendants or their negotiators that he was the named payee but on the contrary they knew that he was not the intended payee, and believed that another had written the first indorsement.

Analysis of cases cited on behalf of appellants

A review of the authorities relied on by appellants in support of their contentions that the doctrine of equitable estoppel and neligence constitute defenses in the present case discloses that with three exceptions, representing the minority view of the bank depositor cases inapplicable here and contrary to decisions of the Supreme Court of the United States, the Federal, District and Circuit Courts of Appeals, including the decisions of this Court, every case cited by appellants is either distinguishable on its facts from the present case or is contrary to later decisions of the same jurisdiction. In the face of the overwhelming weight of authority as shown from the leading federal and state decisions cited in this brief on behalf of the appellee, the cases cited by appellants will be found to be so readily distinguishable as to lead one to believe appellants have

cited and quoted from them at length in an attempt to confuse this Court as to the state of the law.

The cases of *American Hominy Co.* v. *Millikin National Bank,* 273 Fed. 550 (D. C. S. D. Ill., 1920), cited at page 24 of appellants' brief, and the case of *Armour & Company* v. *Green County State Bank,* 112 Fed. 631 (C. C. A. 7, 1902), cited at page 27 of appellants' brief, involve the issuing of drafts by plaintiffs' grain agents to fictitious payees. The agent in each case had authority to draw drafts of a similar nature upon plaintiffs and as the drafts in question were made payable to fictitious payees, by intention of the drawer, they were payable to the bearer under Section 9 (3) of the Uniform Negotiable Instruments Law, and the court so held. The checks in the present case, although payable to fictitious payees, were drawn in the belief that they were payable to actual persons and were not, therefore, payable to bearer (Appellants' App. 49).

In applying the doctrine of equitable estoppel, contended for by the appellants here, the courts recognized that doctrine had no application where the relationship of the parties was that of "banker and depositor" but stated that the transactions involved resembled the drawing of inland bills of exchange, in which case payment to the holder is effectual and the drawee cannot recover back money paid to the holder thereof. Certainly, therefore, these decisions are of no authority for application of the doctrine of equitable estoppel or negligence in the present case.

The case of *Bartlett, et al.* v. *First National Bank of Chicago,* 247 Ill. 490, 93 N. E. 337 (1910), cited by appellants at page 32 of their brief, is similar in all respects to the above two cited cases, except there was the further fact of knowledge on the part of the plaintiff that its agent was forging drafts and possessing this knowledge permitted it to continue. The court in *United States Storage Company* v. *Central etc. Bank, supra,* said these cases (American Hominy and Bartlett), page 512, "were based upon the general authority of the officers or agents drawing the instruments in those cases to endorse such instruments and bind their principals."

In the case of *Hartford Accident & Indemnity Company* v. *Fifth Third Union Trust Company,* 23 F. Supp. 53 (D. C. S. D.

Ohio, 1938), cited at page 30 of appellants' brief, the check was likewise drawn by the agent with authority to draw checks without intending the named payee to receive it. The court ruled that this made the check payable to bearer and therefore not a forgery. The court applied the doctrine of equitable estoppel, for as the agent had the principal's authority to draw the checks "under these circumstances the Phoenix Indemnity Company must be regarded as having placed in his hands the means of clothing him with the authority which enabled him to commit the wrong." (This is the same test applied by the Supreme Court of the United States in *National Safe Deposit Company* v. *Hibbs,* 229 U. S. 391, 396 (1913).)

The cases of *C. E. Erickson Co.* v. *Iowa National Bank,* 211 Iowa 495, 230 N. W. 342 (1930) cited at page 59 of appellants' brief, and *Defiance Lumber Company* v. *Bank of California,* 180 Wash. 533, 41 P. (2d) 135 (1935), cited at page 36 of appellants' brief and *Young* v. *Gretna Trust & Savings Bank,* 184 La. 872, 168 So. 85 (1936), represent the minority view in the "bank-depositor" cases and are the only cases cited by appellants which might appear to indicate that recovery may be precluded because of the negligence of the drawer in the issuance of checks and not discovering the forgeries. The *C. E. Erickson* case was considered in *American Sash & Door Company* v. *Commerce Trust Company, supra,* and criticized and distinguished as follows, pages 111, 112:

> In *C. E. Erickson Co.* v. *Iowa Nat'l Bank,* 211 Iowa 495, 230 N. W. 342, 344, the facts were similar to those here but more aggravated. The plaintiff company's payroll clerk fraudulently caused its treasurer to issue 479 of its special payroll checks payable to former employees through a period exceeding three years. These were delivered to the clerk for distribution. He forged the endorsements of the payees thereon and added his own. The case, without citing any of the authorities referred to in the preceding paragraph, holds the act of the treasurer in issuing the checks amounted to a representation that the payees were employed by the company, and says: "If the drawee-bank in paying the check reasonably believed that the payee was a present

employee it might also reasonably believe that the endorsement was genuine." (* * * *How the fact that the payee in a check was an employee could identify the person endorsing or presenting it for payment, is more than we can see.*)

The Missouri court in this leading decision refused to follow the *Erickson* case and held that as a matter of law there was no evidence of negligence which was the proximate cause of the payment by the defendant.

Young v. *Gretna Trust & Savings Bank* followed in part the absurd reasoning of the *Erickson* case, that is to say "If the drawee-bank in paying the check reasonably believed that the payee was a present employee, it might also reasonably believe that the endorsement was genuine." The *Defiance Lumber* case was a five-to-four decision that the evidence of the depositor's negligence was sufficient for the jury. As the strong dissent pointed out, the majority completely overlooked the question whether any negligence of the plaintiff could have been the proximate cause of the payments by the defendant, where the plaintiff made no representation to the defendant concerning the endorsements. In the light of the holdings in nearly all other jurisdictions the *C. E. Erickson Company,* the *Defiance Lumber Company* and the *Young* cases are plainly opposed to the common law and the Uniform Negotiable Instruments Law, applicable in cases of this nature.

The case of *Central Trust Co.* v. *Eureka-Security Fire & Marine Insurance Co.,* 50 Ohio App. 308 (1935), 198 N. E. 62, cited at page 38 of appellants' brief, is shown by the appellants' own statement of the case to be so distinguishable on the facts that it is hardly considered necessary to comment upon it. This case must, however, be read in the light of the later case of *Hartford Accident & Indemnity Co.* v. *Bank,* 61 Ohio App. 217 (1938), 22 N. E. (2d) 517 (1938). In the *Central Trust Co.* case an agent of an insurance company fraudulently induced the company to issue a draft payable to a fictitious policyholder without intending that the payee should receive the proceeds. The agent had also fraudulently induced the company to issue the policy in the first instance to the fictitious person. In the *Hartford Accident & Indemnity Company* case, the policies were

genuine and the agent himself drew the draft, not intending the payee to receive payment. The *Central Trust Company* case held the agent's endorsement on the checks *was not a forgery* since he was in fact the policyholder acting under an assumed name, and applied the rule applicable in the impostor cases. The case was distinguished on this ground in the *Hartford Accident & Indemnity Company* case, which held that while the instruments (drafts) were negotiable, the action was not one based upon the law peculiar to such instruments and that the terms of the drafts should have put the bank on notice that the agent (a depositor of the bank) should not have had it in his possession after endorsement by the payee.

The case of *United States* v. *First National Bank of Prague, Oklahoma,* 124 Fed. 484 (C. C. A. 10, 1941), cited at page 40 of appellants' brief, is certainly no authority on behalf of appellants. The case discusses the impostor rule and finds it to be inapplicable to the facts, holding the bank liable for its acts of negligence in inducing the issuance of the check to the impostor. The case is also opposed to appellants' contention that the statute of limitations and laches may be interposed as a defense.

The case of *Royal Indemnity Co.* v. *Federal Reserve Bank of Cleveland,* 38 F. Supp. 621 (D. C. S. D. Ohio, W. Div., 1939), cited at page 42 of appellants' brief, is a decision holding that it was the duty of the plaintiff's assignor to have compared the genuineness of the payees' signatures on insurance drafts with those in its possession appearing on insurance applications, and that this failure was negligence authorizing application of the doctrine of equitable estoppel. The holding of this case that it was the duty of the drawer to detect forgeries in endorsements by comparing them with genuine signatures in its possession is contrary to well established law and cites no authority to support the doctrine enunciated. See *United States* v. *National Exchange Bank of Providence, supra; Los Angeles Investment Company* v. *Home Savings Bank, supra; Jordan Marsh Co.* v. *National Shawmut Bank, supra.* The court certainly misinterpreted *United States* v. *Guaranty Trust Company,* 293 U. S. 340, 349 (1934), and *Insurance Company of North America* v. *Fourth National Bank, supra.*

The cases of *Osborne et al.* v. *Corn Exchange National Bank,* 218 Ill. App. 28 (1920), and *Kaszab* v. *Greenbaum Sons Bank & Trust Company,* 252 Ill. App. 107 (1929) (the second case was based on the first), referred to at pages 58 and 53, respectively, of appellants' brief, are decisions by a lower Illinois court and are contrary to the later case of the Illinois Supreme Court of *United States Storage Co.* v. *Central etc., Bank, supra,* discussed in plaintiff's brief at page 29. That these two lower court cases are no longer Illinois law is shown by the case of *De Wolf & Company, Inc.* v. *Foreman Nat'l Bank,* 264 Ill. App. 23 (1931), where the court said at page 26:

> In support of these defenses (that plaintiff was negligent in failing to examine the monthly statements and cancelled checks, and further negligent in failing to keep proper supervision over its employees to whom it entrusted checks for delivery), chief reliance is placed upon the cases of *Kaszab* v. *Greenbaum Sons Bank and Trust Co.,* 252 Ill. App. 107, and *Osborne* v. *Corn Exchange Nat. Bank of Chicago,* 218 Ill. App. 28. It is unnecessary to discuss the holding in those two cases because our Supreme Court in a later case passed on the question now under consideration in *Cosmopolitan State Bank* v. *The Lake Shore Trust & Savings Bank,* 343 Ill. 347 (quotation). See also *United States Cold Storage Co.* v. *Central Mfg. Dist. Bank,* 343 Ill. 503.
>
> The questions decided in the two cases just referred to are decisive of the questions involved in the case before us, and the judgment is affirmed.

The case of *Prudential Insurance Company* v. *National Bank of Commerce,* 227 N. Y. 510, 125 N. E. 824 (1920), cited at page 54 of appellants' brief is readily distinguishable on its facts from the present case. As the Court of Appeals said in *New York* v. *Bronx County Trust Co., supra,* discussed in appellee's brief at page 21:

> So far as the evidence shows, no facts came to the city's knowledge, as in *Prudential Ins. Co.* v. *National Bank of Commerce* (227 N. Y. 510), to put it on inquiry.

> Lacking such warning it had a right to rely upon the vigilance of the banks in detecting forged endorsements.

In the case at bar no such facts came to the Government's knowledge as came to the knowledge of the drawer in the *Prudential Insurance Company* case—knowledge of the dishonesty of its employee. The *Prudential* case is also cited and distinguished by this Court in *The City Bank* v. *Hamilton National Bank, supra.*

The case of *North British and Mercantile Insurance Co.* v. *Merchants National Bank,* 146 N. Y. S. 720, 161 App. Div. 341 (1914), cited at page 56 of appellants' brief, is contrary to the later case of *New York* v. *Bronx County Trust Co., supra,* and was relied upon by the defendants in the latter case in support of the contention there made that negligence of the drawer of the check constituted a defense. That negligence in the issuing of the checks or failing to discover the forgeries is no defense to the defendants under the established law of New York is clearly shown by the *Bronx County Trust Company* case and by the case of *National Surety Corp.* v. *Federal Reserve Bank,* 292 N. Y. S. 607 (1936), where the court said:

> The fourth and fifth defenses refer to the drafts only and set up that the insured was negligent in drawing and accepting the drafts and that the loss occurred in that manner. There is no statement that defendant relied upon anything done by the insured. On the contrary, it is alleged that it relied upon the prior indorsement of the First National Bank of Boston. Even without this allegation, which would appear to be essential, the defenses are not valid. *It is well settled in this jurisdiction that the negligence of a drawer of a check is no defense to a collecting bank. City of New York* v. *Bronx County Trust Co.,* 261 N. Y. 64, 184 N. E. 495; *Corn Exchange Bank* v. *Nassau Bank,* 91 N. Y. 74, 43 Am. Rep 655.

The case of *Pannonia Building & Loan Association* v. *West Side Trust Company,* 93 N. J. L. 377, 108 A. 240 (1919), cited at page 55 of appellants' brief, was decided on the ground that the plaintiff company, a depositor of the defendant bank, was

negligent in failing to examine the vouchers returned with the cancelled checks and that if it had done so it would have discovered the endorsement of its employee beneath the forged endorsements. Unlike the case here, the defendant in that case was the bank on which the checks were drawn and the plaintiff therefore owed the defendant a contractual or relational duty. However, on this point the case is contrary to well established law and cannot be reconciled with the later case of *Board of Education* v. *National Union Bank, supra,* discussed in appellee's brief at page 23. The *Board of Education* case represents the latest view of the highest court of New Jersey on the issues presented here.

The case of *City of Indianapolis* v. *National City Bank,* 80 Ind. App. 677, 141 N. E. 249 (1923), cited at page 57 of appellants' brief, enunciates a queer doctrine that the rule applicable in bank-depositor cases "that a bank on which a check is drawn must ascertain, at its peril, the identity of the person named therein as payee" is limited to cases "where a check is presented for payment by a person who claims to be the payee." This is the only decision which we have been able to find that attempts to make such a limitation upon the rule and certainly does not represent the law on the subject. The court cites no authority to support such a limitation. The ruling is contrary to the holding of this Court in *National Metropolitan Bank* v. *Realty Appraisal & Title Co., supra.*

The appellants place great reliance upon the case of *United States* v. *Commercial National Bank,* at law No. 77,050, in the Supreme Court of the District of Columbia (now District Court), cited at page 23 of appellants' brief. It is an opinion by the District Judge (Baily) which cites no authorities in its support. The case, as will appear from the stipulation of facts and the brief submitted in behalf of the defendant, was presented on the theory that it was one of an impostor and fully within the doctrine applicable to impostor cases. The facts support this theory except as to one check. The doctrine of equitable estoppel as contended for by appellants may properly be interposed as a defense in the impostor case. And, we have no quarrel with the conclusion reached, except possibly as to one check. However, the District Judge did not point out the dis-

tinction between the impostor rule and that involved in a forgery, but decided the case upon the theory that it was distinguished from *United States* v. *National Exchange Bank of Providence, supra,* by reason of the fact that the party who perpetrated the fraud was an employee of the District of Columbia. The law is well established that it makes no difference whether the party who obtained and forged the check is an employee of the principal or a stranger.

III

The right of recovery of the United States is not barred by laches

It is contended on behalf of the appellants that the United States was not acting in its sovereign capacity in the issuance of the checks but became a party to commercial paper, and as such was subject to the equitable principle and doctrine of laches. Although appellants make this bold contention, they do not show in what respect the government was guilty of laches, unless it be their contention that the court should apply the three-year statute of limitations applicable to private litigants as a yardstick and bar the right of the United States to recover on all checks upon which payment was made more than three years prior to the filing of the complaint, namely, January 5, 1939. The appellants cite no authority to support this contention, for there is none. In fact the authorities they cite refute their own contention.

> *Ladd & Tilton Bank* v. *United States, supra.*
> *United States* v. *Clinton National Bank,* 28 Fed. 357 (C. Ct., S. D., Iowa 1886).

That the United States is not subject to the statute of limitations in this case is clear. See Title 24, Sec. 344 D. C. CODE (1929); *United States* v. *Thompson,* 98 U. S. 486 (1878); *Guaranty Trust Company* v. *United States,* 304 U. S. 126 (1938). Certainly, if the statute of limitations is not applicable, the equitable doctrine of laches, which is applied in equitable actions by way of analogy to the statute of limitations in actions at law may not be applied.

In order for laches to constitute a defense in a suit of this nature, it must at least appear that after the United States had knowledge of the forgeries there was unreasonable delay in giving notice thereof to the banks and that by reason of such delay the banks were prejudiced; and even in such a case the defense is only partial to the extent of the injury or prejudice shown. *Ladd & Tilton Bank* v. *United States, supra.* No such defense is raised by the defendants and if it can be considered to be raised, the facts fail to support it. The facts in this connection are that the United States first had suspicion of the fraudulent activities of Stitely during the month of April, 1937 (Appellants' App. 31). An investigation was immediately started by the National Park Service of the Department of Interior, ultimately disclosing the entire fraud (Appellants' App. 32). The defendant banks were given formal notice of demand January 25, 1938 (Appellants' App. 40) and suit was filed January 5, 1939 (Appellants' App. 2, 40). There is no claim that the United States failed to give prompt notice of the forgeries or that the banks were in any way prejudiced by a failure to give such notice. Accordingly, the facts in this case do not warrant the application of the equitable doctrine of laches. See also the case of *United States* v. *First National Bank of Prague, Oklahoma, supra,* cited at pages 40–41 of appellants' brief, in which the court at page 488 said:

> Both banks pleaded the local statute of limitations, and laches. The check was issued, endorsed, and paid in 1932; and no demand for repayment was made until 1938. Ordinarily a right of action of the United States is not subject to a state statute of limitations. *United States* v. *Thompson,* 98 U. S. 486, 25 L. Ed. 194; *United States* v. *Nashville, Chattanooga & St. Louis Railway Company,* 118 U. S. 120, 6 S. Ct. 1006, 30 L. Ed. 81; *Chesapeake & Delaware Canal Company* v. *United States,* 250 U. S. 123, 39 S. Ct. 407, 63 L. Ed. 889; *Guaranty Trust Company* v. *United States,* 304 U. S. 126, 58 Sup. Ct. 785, 82 L. Ed. 1224. And where the United States, acting in its governmental capacity, has the right to assert a claim, either by virtue of ownership from its inception or by acquisition, and exerts its right of asser-

tion, it cannot be deemed to have abdicated its governmental authority in such manner as to become subject to a local statute imposing a limitation of time upon enforcement. *United States* v. *Summerlin*, 310 U. S. 414, 60 S. Ct. 1019, 84 L. Ed. 1283. Nor is a cause of action asserted by the United States in such capacity subject to the defense of laches. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199; *United States* v. *Thompson*, *supra*; *United States* v. *Insley*, 130 U. S. 263, 9 S. Ct. 485, 32 L. Ed. 968; *Guaranty Trust Co.* v. *United States*, *supra*.

CONCLUSION

In view of the foregoing it is respectfully submitted that the verdicts as directed by the court below should be affirmed.

Respectfully submitted,

EDWARD M. CURRAN,
United States Attorney,
BERNARD J. LONG,
Assistant United States Attorney,
Attorneys for Appellee.

OF COUNSEL
FRANCIS M. SHEA,
Assistant Attorney General.
GEORGE F. FOLEY,
ROBERT KAPLAN,
Attorneys, Department of Justice.

U. S. GOVERNMENT PRINTING OFFICE: 1942

REPLY BRIEF FOR APPELLANTS.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED DEC 30 1942

Joseph W. Stewart
CLERK

No. 8247.

THE WASHINGTON LOAN AND TRUST COMPANY, A CORPORATION, Appellant,

v.

UNITED STATES OF AMERICA, Appellee,

No. 8248.

THE RIGGS NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION, Appellant,

v.

UNITED STATES OF AMERICA, Appellee,

and

No. 8249.

THE COLUMBIA NATIONAL BANK OF WASHINGTON, A CORPORATION, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeals from the District Court of the United States for the District of Columbia.

ARTHUR PETER,
Washington Loan & Trust Building,
GEORGE P. HOOVER,
Investment Building,
Washington, D. C.,
Attorneys for Appellant,
The Washington Loan and Trust Company,
(No. 8247)

FRANK J. HOGAN,
NELSON T. HARTSON,
Colorado Building,
Washington, D. C.,
Attorneys for Appellant,
The Riggs National Bank of Washington, D. C.
(No. 8248)

GEORGE P. HOOVER,
Investment Building,
WALTER B. GUY,
917 15th St., N. W.,
Washington, D. C.,
Attorneys for Appellant,
The Columbia National Bank of Washington.
(No. 8249)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Page

I. The argument on the brief of appellee confuses the defense of equitable estoppel, presented under the seventh defense, with the defense of negligence, presented under the fifth and sixth defenses, and fails to advance any argument, or cite any authority, in opposition to the contention of appellants that the defense of equitable estoppel is applicable to the facts here presented 2

II. Appellee's attempted analysis of cases cited and relied upon by appellants in support of the applicability of the principle of equitable estoppel fails to distinguish the cases so cited from the facts here presented 14

Conclusion 25

TABLE OF CASES.

American Hominy Co. v. Millikin National Bank, 273 Fed. 550 ..... 16, 17

American Surety Co. of New York v. Bank of California, 44 F. Supp. 81 19

Armour & Company v. Greene County State Bank, 112 Fed. 631 16

Bartlett v. First National Bank, 247 Ill. 490 17

Central Trust Co. v. Eureka-Security Fire & Marine Insurance Co., 50 Ohio App. 308, 198 N. E. 62.... 21

Defiance Lumber Co. v. Bank of California, 180 Wash. 533, 41 P. (2d) 135 ..... 18, 19

Humphrey's Executor v. United States, 295 U. S. 602 7

Insurance Co. of North America v. Fourth National Bank of Atlanta, 12 F. (2d) 100 ..... 3, 5

Insurance Co. of North America v. Fourth National Bank of Atlanta, 14 F. (2d) 131 8

Insurance Co. of North America v. Fourth National Bank of Atlanta, 28 F. (2d) 933 9

Insurance Co. of North America v. Fourth National Bank of Atlanta, 279 U. S. 853 10

Page

Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N. E. 740 ..... 3, 13
New York v. Bronx County Trust Company, 261 N. Y. 64, 184 N. E. 495 ..... 3, 10
Royal Indemnity Co. v. Federal Reserve Bank of Cleveland, 38 F. Supp. 621 22
United States v. Bank of America National Trust & Savings Association, 47 F. Supp. 279 23
United States v. Commercial National Bank, At Law No. 77,050 22-23
United States v. First National Bank of Prague, Oklahoma, 124 F. (2d) 484 21-22
United States v. National Exchange Bank of Providence, 214 U. S. 302 3
United States Cold Storage Company v. Central Mfg. District Bank, 343 Ill. 503, 175 N. E. 825 ..... 16, 17
Young v. Gretna Trust & Savings Bank, 184 La. 872, 168 So. 85 ..... 18, 19

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8247

THE WASHINGTON LOAN AND TRUST COMPANY, A CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee,*

No. 8248

THE RIGGS NATIONAL BANK OF WASHINGTON, D. C., A CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee,*

and

No. 8249

THE COLUMBIA NATIONAL BANK OF WASHINGTON, A CORPORATION, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee,*

Appeals from the District Court of the United States for the District of Columbia.

REPLY BRIEF FOR APPELLANTS.

I.

The argument on the brief of appellee confuses the defense of equitable estoppel, presented under the seventh defense, with the defense of negligence, presented under the fifth and sixth defenses, and fails to advance any argument, or cite any authority, in opposition to the contention of appellants that the defense of equitable estoppel is applicable to the facts here presented.

The seventh defense of appellants (Appellants' App. p. 9) is based upon the equitable principle that if any loss is to fall on one of two innocent persons, the one whose neglect or lack of foresight made possible the loss, is the one who must bear the burden. The fifth and sixth defenses of appellants (Appellants' App., pp. 7-8) present the legal defense of negligence.

The argument of appellants upon the applicability of the equitable principle of estoppel, and citation of numerous authorities in support thereof, appear on the brief of appellants under Point I (Br., p. 19-49). On pages 44 to 49 of the brief of appellants, we have undertaken to analyze the opinion of the court below, and have demonstrated, as we believe, that the court below erred in holding that the equitable principle of estoppel is not applicable to the facts here presented. As there pointed out (Appellants' brief, pp. 44-45), the court below held that the principle and doctrine of equitable estoppel is not applicable to the facts here presented for the reason that it was necessary for Stitely to forge the checks in suit, and then to make an implied false representation to each bank which cashed the checks. An examination of the brief of appellee reveals that no attempt has been made by counsel for appellee to support this reasoning and holding of the court below.

On page 47 of the brief of appellants we pointed out that in each of the cases cited and relied upon by appellants (except *Savary* v. *Carusi*) (Appellants' brief, pp. 23-44) in support of the argument that the equitable principle of estoppel is applicable to the facts here presented, it appears

that the names of the payees in the checks and drafts were forged by the wrongdoer, yet, in each of these cases, the court applied the equitable principle and doctrine here contended for by appellants.

The ruling and holding of the court below is diametrically opposed to the cases cited and relied upon by appellants; and no cases are cited on the brief of appellee which support the ruling of the court below.

The only cases cited by counsel for appellee on their brief in support of their argument that the principle of equitable estoppel is not applicable to the facts presented are: *United States* v. *National Exchange Bank of Providence,* 214 U. S. 302 (1909) (brief, p. 7); *Insurance Co. of North America* v. *Fourth National Bank of Atlanta,* 12 F. (2d) 100 (Dist. Ct., N. D., Georgia, 1926), discussed at pages 18 to 20 of brief of appellee under Point II, relating to negligence; *New York* v. *Bronx County Trust Company,* 261 N. Y. 64, 184 N. E. 495 (1933), rehearing denied without opinion, 261 N. Y. 622, 185 N. E. 569, discussed at pages 21-22 of brief of appellee under Point II, on the question of negligence; and *Jordan Marsh Co.* v. *National Shawmut Bank,* 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (NS) 250 (1909), discussed at pages 26-27 of brief of appellee under Point II, on the question of negligence.

An examination and analysis of the cases relied upon by appellee in support of the argument that the equitable principle of estoppel is not applicable to the fact here presented, will readily reveal that in none of the cases cited by appellee was the equitable principle of estoppel presented, considered, or decided by the court.

United States v. *National Exchange Bank of Providence,* 214 U. S. 302 (1909):

Respecting the defenses interposed by the defendant, Mr. Justice White stated (p. 305):

> **"In substance, the defenses interposed in the answer of the bank were that, if the facts averred in the declaration were established by the proof, the bank was yet not liable, because the action had not been brought**

within a reasonable time after the alleged payments of the drafts, nor had prompt notice been given of the discovery of the forgeries. It was also averred that the United States had been negligent in not verifying the signatures of the payees of the checks in suits by comparing them with signatures of the payees in its possession."

In the course of the opinion the court said (p. 310):

"The circuit court of appeals reversed the judgment in favor of the United States upon the ground that, by the operation of an exceptional rule, said to prevail, under certain conditions, as to commercial paper, the United States could not recover for the mistaken payments, as there had been unreasonable delay in giving notice to the Exchange Bank after the discovery of the forgeries. The correctness of this action is assailed in the assignments of error, the government contending that the pension checks in question were mere Treasury warrants, not commercial paper in the true sense of that term, and hence not controlled by the so-called exceptional commercial rule; but that, even if the checks were commercial paper, and governed by such rule, mere negligent delay in giving notice of the discovery of the forgery would not prevent recovery unless the Exchange Bank established by proof that it had thereby suffered damage. It is besides claimed that if the agents of the government were negligent in giving notice of the discovery of the forgeries, their laches cannot be imputed to the United States. The Exchange Bank not only traverses these assignments, but insists that the claim of the United States to recover was rightfully rejected, because the duty was on it not only to give prompt notice of the discovery of the forgeries, but also to discover the forgeries promptly after payment,—a contention which is controverted by the government.

"In order to simplify the issue for decision we concede, for the sake of the argument only, that the forged instruments were not official warrants, as contended by the government, but, in a generic sense, are to be classed as negotiable commercial paper, and that, in a case coming within the exceptional rule referred to, the

laches of the authorized agents of the government can be imputed to it. But, assuming the instruments to be negotiable paper, the question yet remains whether the right of the United States to recover from the Exchange Bank is controlled or limited by the exceptional rule referred to."

At page 320 the court said:

"Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged indorsement having been broken at the time the checks were cashed by the United States, and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which, by the operation of the legal warranty, were presumably within the knowledge of the defendant.

"The conclusion to which we have thus come renders it unnecessary to consider whether, if the facts presented merely a case of mutual mistake, where neither party was in fault, and reasonable diligence was required to give notice of the discovery of the forgery, if there was lack of such diligence, it would operate to bar recovery by the United States, although the Exchange Bank was not prejudiced by the delay." (Emphasis ours.)

An examination of the opinion of the court in this case reveals that the principle of equitable estoppel (here presented by the seventh defense of appellants) was neither presented, considered, nor decided by the court.

Insurance Co. of North America v. *Fourth National Bank of Atlanta,* 12 F. (2d) 100 (D. C., N. D. Georgia, 1926):

Action by the Insurance Co. of North America against the Fourth National Bank of Atlanta. On demurrer to defense made in answer. Demurrer sustained.

Action in two counts; first, for money had and received, and second, as damages for breach of an implied warranty of title and right to collect the drafts.

The original answer of the bank made denials, and set up a bar by election of an inconsistent suit brought by the

Insurance Company in another court. **Later, by two amendments of the answer, an additional defense was sought to be made that the loss to the Insurance Company was due to its own negligence in issuing and in paying the drafts over so long a period of time without discovery of the forgeries,** and especially that each draft but one had been altered since its issuance by adding the name of W. J. Nelson as one of the payees, which alteration should have provoked inquiry.

At page 101 the court said:

> **"General and special demurrers to this plea of negligence are alone for decision now.**
>
> "Several of the special demurrers complain of the vagueness of the allegations as to the means of knowledge which it is intended to charge that the insurance company had and neglected, and as to how it could and should have known it was paying on forged indorsements. No amplification in response to these demurrers has been attempted. The general averments of possession of books and records disclosing the forgeries, and of opportunity to discover them, must be disregarded as mere conclusions. There are but two definite facts stated, which are sufficiently pleaded, to wit, that though each draft purported to be, and was intended to be, a payment of a fire loss to a policy holder, there were no such losses, and no such policies in fact, as would appear from the insurance company's records, and that W. J. Nelson's name was added after issuance in each draft except one. The questions are: Should the insurance company have noted these facts and been led by them to suspect and detect the frauds? And, if so, is the failure to do so a defense to the bank?"

At page 102 the court said:

> "I do not perceive that the equitable doctrine ought to apply that, if one of two equally innocent parties must suffer by the act of a third, the loss should be borne by the party through whose fault the injury became possible. The fraud of a trusted agent does not always fix the loss on his innocent principal, as against the third person injured, though the principal was careless. It does so only when the principal has failed in

his duty. In this case the duty to see that these indorsements were genuine was on the bank, and those under whom it took, and not on the insurance company. The insurance company is not complaining of the acts of its fraudulent agent. It is complaining of the dereliction of the bank, a dereliction which seems to me to be clearly established by law."

At the conclusion of the opinion the court sustained the demurrer to the plea of negligence.

It will thus be seen that the demurrer was sustained because of the insufficiency in law of the plea of negligence. The equitable principle and doctrine here invoked by the seventh defense of the appellants was not pleaded in the case cited, and for that reason the case may not be considered as an authority in opposition to the contention of the appellants.

In *Humphrey's Executor* v. *United States,* 295 U. S. 602 (1935), in referring to the case of *Myers* v. *United States,* 272 U. S. 52, Mr. Justice Sutherland, speaking for the court, said (p. 626):

"In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved, and therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290, in respect of certain general expressions in the opinion in Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60.

"Chief Justice Marshall, who delivered the opinion in the Marbury case, speaking again for the court in the Cohen case, said:

" 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the the court is investigated

> **with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated'."** (Emphasis ours.)

In order that the court may be apprised of the proceedings in *Insurance Co. of North America* v. *Fourth National Bank of Atlanta, supra,* subsequent to the sustaining of the demurrer to the plea of negligence, we call attention to the following decisions:

Insurance Co. of North America v. *Fourth National Bank of Atlanta,* 14 F. (2d) 131 (Dist. Ct., N. D. Georgia, 1926):

On demurrer to amended answer, sustained in part and overruled in part, Sibley, District Judge, in the course of his opinion said (p. 131):

> "The pleadings ruled upon in the former opinion in this case (12 F. (2d) 100), treated the defendant bank as the holder of the several drafts bearing forged indorsements, which were paid by the plaintiff insurance company. The pleadings have now been amended to set up facts under which it is claimed that the defendant, in presenting the drafts, was not their holder, nor ostensibly such, but was, under the operation of clearing house rules and practices, which were well known to the plaintiff, the agent of the holder which had brought the drafts to the clearing house, or at most was an indorsee for collection and therefore an agent, and that, furthermore, by a specific agreement, it was receiving and presenting the drafts in behalf of and at the request of the plaintiff, without any of the implications as between them that would obtain otherwise. Elaborate demurrers have been argued, some of them as to portions of the amendment being argumentative and mere conclusions are well taken, but it will be sufficient to treat such portions of the pleadings as setting forth the contentions of the defendant, and treating as facts admitted by the demurrer only those allegations that directly allege ultimate facts. The facts here pleaded, in addition to those set forth in the former opinion, may be thus summarized: * * *".

The court then set forth the facts regarding the arrangement between the insurance company and the bank respecting the handling and presentation of the checks and the operations of the clearing house, through which the checks were passed and presented.

In disposing of the questions presented by the demurrer to the amended answer, the court first held, on the foregoing aspect of the case (p. 133), "that the amendment pleads facts sufficient to afford a defense".

Respecting the portion of the amended answer presenting the defense of negligence, the court said (p. 133):

> **"The paragraphs numbered 18 to 28, inclusive, seem to be but an amplification of the contention of negligence on plaintiff's part, which was dealt with in the former opinion. If defendant was not the presenting holder of the drafts, it is not liable. If it was, its liability exists, irrespective of the negligence of plaintiff, as heretofore ruled. The claim of negligence in plaintiff is irrelevant in either event.** The contention that the drafts were to be for insurance losses seems to me to be without weight. These drafts were supposed by the parties to be such. That they were not actually was a fraud on the insurance company, the loss by which it must have borne had the indorsements been genuine. It is not apparent how this want of consideration for them operated as a fraud on the presenting holder. The agreement that the drafts would be for actual losses is no stronger than the statement in each draft that it was for such. Neither absolves a presenting holder otherwise liable from his responsibility for the chain of indorsements under which he claims the right to collect the money. These paragraphs will be stricken as pleading irrelevant facts and insufficient to constitute a defense." (Emphasis ours.)

Insurance Co. of North America v. *Fourth National Bank of Atlanta,** 28 F. (2d) 933 (CCA, 5th Cir., 1928):

From judgment for defendant, plaintiff appeals, and defendant brings cross-appeal. Affirmed.

---

* Rehearing denied December 19, 1928.

In the opinion of the court it is stated (p. 935):

> "Two propositions were submitted to the jury involving issues of fact: First, the contention of defendent that, under the agreement by which it was to handle the drafts, it became the agent merely of the plaintiff for its convenience in collecting them, assuming no responsibility as a bank or indorser thereof; and, secondly, if not the plaintiff's agent, that it was the agent of the Fulton Bank in presenting them for payment, and plaintiff's remedy was against the latter institution alone. * * * It, the jury, evidently decided one or all of these controverted issues adversely to plaintiff, for the verdict was 'for the defendant'. In any event, there was substantial evidence to show that plaintiff understood the effects of the rules of the clearing house, which, together with the nature of the indorsement of the Fulton Bank above quoted, that the drafts were paid 'through' that source, were sufficient to charge plaintiff with knowledge that the original stamp of payment was not unconditional."

Again (pp. 935-936):

> "Other points are raised with respect to the rulings of the lower court upon exceptions and demurrers to the pleadings, as well as to the admissibility of certain evidence, but, without going into detail, it is sufficient to say that we find nothing therein which, in our opinion, warrants a reversal of the lower court, and its judgment is accordingly affirmed."

Insurance Co. of North America v. *Fourth National Bank of Atlanta,* 279 U. S. 853 (Petition for writ of certiorari denied April 15, 1929).

City of New York v. *Bronx County Trust Company,* 261 N. Y. 64, 184 N. E. 495 (1933):

In this case the City of New York brought suit against the Bronx County Trust Company, a depositary of city funds, for $11,229.13, allegedly paid out on forged checks. The Bronx County Trust Company impleaded four other banks as defendants, alleging it had paid the checks which

were endorsed by them guaranteeing prior indorsements. The Bronx County Trust Company then paid the claim of the City and prosecuted its remedy against the four other banks.

The Supreme Court entered judgment against the Bronx County Trust Company and it appealed. The Appellate Division reversed the judgment and entered judgment for the Bronx County Trust Company (234 App. Div. 244). On appeal, the judgment of the Appellate Division was affirmed (261 N. Y. 64).

In the course of the opinion the Court of Appeals said (p. 71):

> "We come, then, to one substantial question. This system of payroll payment was first put in use by the city of New York in 1915. There were at that time 135 depositary banks with which the city had accounts. To each of those banks, including all the parties to this action, was sent a letter which referred to the pay plan as having been devised for making pay checks of the city of New York 'as good as currency,' and stated among other things that the plan included 'the use of a self-identifying check', and further that 'the circular which I am enclosing describes the way employees make out checks so as to make the signature, in effect, certified by the city'. There was enclosed a list of the banks which had assented to the plan. The circular to which reference was thus made was a copy of one which had been distributed to all city employees describing the new pay check and giving directions for its use. Among other things, the employees were told that 'the banks listed below have assured the comptroller that they will cash all checks presented by city employees when properly identified'.
>
> **"The contention of the defendants is that out of that arrangement and the subsequent course of dealing thereunder, there arose between the city and its 135 depositary banks a contractual relationship, or at least an understanding by virtue of which, either contractually or by estoppel, any bank taking one of the city's pay checks would acquire a good title thereto if the endorsement of the payee on the back corresponded with the identification signature on the face.**

"Contract there was not. There is no indication that the banks' 'assurance' that they would cash all checks presented by city employees when properly identified, was anything more than an assurance. The letter, with its accompanying circular, merely described the new plan of payment with expressions of expectations as to how it would operate. So far as the evidence shows, there was nothing to prevent the defendants from refusing to cash a check even when the payee was properly identified.

"It seems equally clear that the doctrine of estoppel has no application. It is a matter of common knowledge that a bank in cashing a check or in accepting it for deposit ordinarily relies only upon the responsibility of the party, usually its own customer, with whom it deals. It pays no attention to endorsements other than his. Upon no other basis could the banking business be carried on. Moreover, the evidence of the defendant bank chiefly interested here, shows that it took the checks in question solely upon the endorsement of its own customer. It 'did not look beyond that'. The defendants as matter of fact were not misled by any act or omission of the city, not by any understanding with it. If, however, we pass over what was actually done and look only to the face of the letter and circular, no warrant will be found for saying that the defendants, had they chosen so to do, were at liberty to identify the payee solely by a comparison of the two signatures or that they had been led to believe that they were. 'The circular', says the letter, 'describes the way the employees make out checks so as to make the signatures in effect certified by the city'. The way the employees were directed to make out checks to the end mentioned is stated thus in the circular: 'When you take the check to the bank for payment you should endorse it in the presence of the paying officer, unless the bank waives this obligation'. So far as the city was concerned, that act by the paying party was obligatory as part of the identification. Somewhere along the line between the issuance of the check and its payment by the drawee bank, identification by that method was essential, unless the paying party chose to waive it; and clearly any waiver was at the risk of that party and of subsequent parties. In the case of none of the ques-

> tioned checks was there any endorsement in the presence of the person paying." (Emphasis ours.)

We submit that the question here presented of equitable estoppel that where one of two innocent persons must suffer by reason of the wrongdoing of a third, the one whose fault made possible the loss should bear such loss, was not involved in, nor decided, in the case cited.

Jordan Marsh Co. v. *National Shawmut Bank,* 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (NS) 250 (1909):

The facts of this case, and the relevant portion of the opinion of the court are set forth on pages 26 and 27 of brief of appellee. An examination of the opinion shows that the court held that the negligence of the drawer of the check in the issuance thereof was not the proximate cause of a payment made by the banker upon whom the check was drawn. The question of equitable estoppel, here presented, was not considered nor decided by the court.

We maintain that none of the cases cited by counsel for appellee support their contention that the principle of equitable estoppel is not applicable to the facts here presented.

On the brief of appellee, in support of the contention that the principle of equitable estoppel is not applicable to the facts here presented, it is argued (brief, p 6):

> "Appellants seek to relieve themselves of liability by invoking the doctrine of equitable estoppel and negligence. As these defenses involve the same questions of law and fact, the arguments in response will of necessity be somewhat repetitious. If the doctrine of estoppel is applicable at all, it is for application against the appellants; certainly not against the United States. This doctrine is based upon the law of negligence."

This argument of counsel for appellee confuses the equitable defense of equitable estoppel, presented under the seventh defense of defendants, with the legal defense of negligence presented under the fifth and sixth defenses of defendants. The doctrine or principle of equitable estop-

pel is not "based upon the law of negligence", as contended by appellee. (Brief, p. 6.)

The defense of equitable estoppel here presented is based upon principles and considerations of equity, and is wholly different from the legal defense of negligence. Under the legal defense of negligence it is necessary that the negligence be the proximate cause of the loss. Under the defense invoking the principle of equitable estoppel it is not necessary that the negligence be the proximate cause of the loss, it being the fundamental principle of the equitable defense that as between two innocent persons the loss should fall upon the one whose fault made possible the loss, irrespective of whether his fault or negligence was the proximate cause of the loss.

It is submitted that no argument is advanced, nor is any authority in point cited on the brief of appellee, in opposition to the contention of appellants that the equitable principle of estoppel is applicable to and should be applied by this court to the facts here presented.

II.

Appellee's attempted analysis of cases cited and relied upon by appellants in support of the applicability of the principle of equitable estoppel fails to distinguish the cases so cited from the facts here presented.

On the brief of appellee (p. 33), under the heading, "Analysis of cases cited on behalf of appellants," an attempt is made to distinguish the cases cited and relied upon by appellants (Appellants' brief, pp. 23-44) in support of the argument that the court below erred in holding that the equitable principle and doctrine that where one of two innocent persons must suffer by reason of the wrongdoing of a third person, the one whose fault made possible the loss should bear such loss, is not applicable to the facts stated in the opening statements of counsel for defendants (appellants).

In the attempted analysis by appellee of the cases cited by appellants, the cases cited and relied upon by appellants in support of the equitable defense of equitable estoppel, presented by the seventh defense (Appellants' App., p. 9) are confused and commingled with the cases cited and relied upon by appellants in support of the legal defense of negligence, presented by the fifth and sixth defenses of defendants (appellants). (Appellants' App., pp. 7-8).

On the brief of appellee it is argued (pp. 33-34):

> "A review of the authorities relied on by appellants in support of their contentions that the doctrine of equitable estoppel and negligence constitute defenses in the present case discloses that with three exceptions, representing the minority view of the bank depositor cases inapplicable here and contrary to decisions of the Supreme Court of the United States, the Federal, District and Circuit Courts of Appeals, including the decisions of this Court, every case cited by appellants is either distinguishable on its facts from the present case or is contrary to later decisions of the same jurisdiction. In the face of the overwhelming weight of authority as shown from the leading federal and state decisions cited in this brief on behalf of the appellee, the cases cited by appellants will be found to be so readily distinguishable as to lead one to believe appellants have cited and quoted from them at length in an attempt to confuse this Court as to the state of the law."

We pass over the insinuation that counsel for appellants have cited and quoted court decisions "at length in an attempt to confuse this Court as to the state of the law" with the observation that if there has been any attempt at confusion it can only arise out of the action of counsel for appellee in persistently confusing and commingling the equitable defense of equitable estoppel, presented by the seventh defense, with the legal defense of negligence, presented by the fifth and sixth defenses of defendants (appllants). As has already been pointed out in an earlier part of this reply brief under Point I, the overwhelming

weight of authority supports the contention of appellants, and appellee has not offered any authority, which may be considered in point, in opposition thereto.

We maintain that the cases cited and relied upon by appellants may not readily be distinguished on the facts from the facts of the case here presented, nor are they contrary to the later decisions of the same jurisdiction, as argued by appellee.

On page 34 of brief of appellee it is argued that the cases of *American Hominy Co.* v. *Millikin National Bank,* 273 Fed. 550 (D. C., S. D. Ill., 1920), cited at page 24 of appellants' brief, and the case of *Armour & Company* v. *Greene County State Bank,* 112 Fed. 631 (C. C. A., 7th Cir., 1902), cited at page 27 of appellants' brief "are of no authority for application of the doctrine of equitable estoppel or negligence in the present case."

The foregoing cases are cited and relied upon by appellants in support of the applicability of the doctrine of equitable estoppel, under Point I of brief of appellants (brief, pp. 24 to 29) and are neither cited or quoted by appellants under Point II on the brief of appellants (pp. 50 to 64), relating to the legal defense of negligence.

In each of the foregoing cases cited the court held that the principle of equitable estoppel was applicable, notwithstanding the fact that it was necessary for the wrongdoer to forge the checks or drafts in order to avail himself of the proceeds. These cases are directly in point, and are diametrically opposed to the ruling of the court below that the doctrine of equitable estoppel is not applicable for the reason that it was necessary for Stitely to forge the names of the payees in the checks.

Neither of the foregoing cases are distinguishable on the essential facts from the facts here presented, as argued by appellee. On page 34 of the brief of appellee it is argued that, "The court in *United States Storage Company* v. *Central etc. Bank, supra,* said these cases (American Hominy and Bartlett), page 512, 'were based upon the general authority of the officers or agents drawing the instruments in

those cases to endorse such instruments and bind their principals.' "

In *United States Cold Storage Company* v. *Central Mfg. District Bank,* 343 Ill. 503, 175 N. E. 825 (1931), the court (at p. 506) said:

> "The defendant * * * bases its defense on the claim that the checks were all payable to bearer because, as it says, they were payable to living persons not intended to have any interest therein, and so, under Paragraph 3 of Section 9 of the Negotiable Instruments Law, were payable to bearer; and for this proposition it cites in its brief, Bartlett v. First National Bank, 247 Ill. 490, and in its argument many other authorities. The foundation of its whole defense is, that the intent of Meister, the chief clerk, who presented the checks for signature and presumably received the money for them, was the intent of the plaintiff."

At page 510 the court said:

> "American Hominy Co. v. Bank of Decatur, 294 Ill. 223, is in all respects the same as Bartlett v. First National Bank, supra."

Immediately preceding the language quoted by counsel for appellee on page 34 of their brief, the court had pointed out that in *American Hominy Co.* v. *Bank of Decatur,* 294 Ill. 223, and *Bartlett* v. *First National Bank,* 247 Ill. 490, the agent of the plaintiff had authority to draw drafts, and by making the drafts payable to fictitious payees, they were payable to bearer by reason of the provisions of Section 9 (3) of the Negotiable Instruments Law. It was in connection with the discussion of this phase of the case only that the court used the language quoted on the brief of appellee in distinguishing the cases cited from the case then being discussed, and held that since the officers who signed the checks had no knowledge of the fraudulent intent of the dishonest employee the checks were not payable to bearer.

On page 36 of the brief of appellee an effort is made to detract from the weight to be accorded to the case of

Young v. *Gretna Trust & Savings Bank,* 184 La. 872, 168 So. 85 (1936), cited and quoted on pages 34 to 36 of brief of appellants, and the case of *Defiance Lumber Co.* v. *Bank of California,* 180 Wash. 533, 41 P. (2d) 135, 99 A. L. R. 426 (1935), cited and quoted on appellants' brief at pages 36 to 38.

In this connection it is argued by counsel for appellee (p. 36):

> "In the light of the holdings in nearly all other jurisdictions * * *, the *Defiance Lumber Company* and the *Young* cases are plainly opposed to the common law and the Uniform Negotiable Instruments Law, applicable in cases of this nature."

In *Young* v. *Gretna Trust & Savings Bank, supra,* the court said (Appellants' brief, p. 36):

> "A well-established rule of equity is applicable here, i. e., that 'where one of two innocent parties must suffer loss through the fraud of another, the burden of the loss should be imposed on him who most contributed to it;' "

and in *Defiance Lumber Co.* v. *Bank of California, supra,* the court said (Appellants' brief, p. 38):

> "The rule that a bank which pays a check upon a forged endorsement must stand the loss is limited to instances in which the acts of the depositor have not increased the risk lawfully resting upon the bank. The equitable doctrine that, as between two innocent persons, the one whose act was the cause of the loss should bear the consequenecs, applies in many cases. * * * We are clearly of the opinion that appellant, by its careless and negligent conduct of its own business, permitted its own employee to perpetrate upon it a gross fraud, and that it cannot now recoup its losses by passing the burden thereof to respondent."

The foregoing cases are not plainly opposed to the common law and to the Uniform Negotiable Instruments Law,

as argued by appellee, but are well reasoned authorities in support of the defense of equitable estoppel, here presented.

The cases of *Young* v. *Gretna Trust & Savings Bank, supra,* and *Defiance Lumber Co.* v. *Bank of California, supra,* are cited with approval in:

American Surety Co. of New York v. *Bank of California,* 44 F. Supp. 81 (Dist. Ct., D. Oregon, Dec. 23, 1941), which was an action brought by the American Surety Co. of New York and E. L. McDougal to recover amounts paid by the defendant bank upon checks carrying forged endorsements, and the court entered judgment for defendant.

It appears that the Interior Warehouse Company was a depositor in the defendant bank. Crowe, a bookkeeper of the Interior prepared but did not sign checks to cover payrolls and other incidental expenses. He conceived the scheme of writing additional checks upon defendant bank, either to persons on the payrolls in sums beyond what was actually due them, or to non-existing persons, and obtaining the money thereon by forging the name of the supposed payee. He carried this out successfully over a period of years, forging the endorsements and generally cashing these checks with Meier & Frank Company, a mercantile establishment in Portland, or with some individual. Crowe was not authorized to sign checks for the Interior since this authority was vested only in two other employees. Neither of these men knew or suspected the scheme of Crowe, or the forging of the endorsements on the checks which they signed. Crowe compared the bank statements and returned checks with the records upon their receipt by Interior and was thus able to delay detection.

On trial Crowe testified as to the 19 checks, the originals of which had been destroyed, that he had drawn the latter to fictitious payees and forged the endorsements thereon.

Plaintiff, the American Surety Co. of New York, and the underwriters at Lloyds in London (assignors of E. L. McDougal) had written policies of insurance by which the employees of Interior, including Crowe, were bonded, and Interior insured against the loss it might sustain by reason of dishonesty of these employees. After notice of the for-

geries the insurers paid Interior the full amount of the loss caused by the dishonesty of its employee, and accepted assignment of any rights which Interior might have against the bank. This action was then brought for $6562.33, the amount of the loss thus paid.

The case was tried to the court without a jury. The court first disposed of a jurisdictional question based upon the contention that diversity of citizenship did not exist. Fee, District Judge, in disposing of the merits of the case, said (p. 84):

> "The rule is uncontroverted in most jurisdictions that a bank, which receives a deposit, makes a contract that it will pay out the money only upon the order of the depositor. If, therefore, a bank pays money upon the depositor's check bearing a forged endorsement of the name of the payee, the bank is liable therefor. This position is ordinarily justified in legal theory by the presumption that the bank under such circumstances pays out its own money and not the money of the depositor. The depositor, on the other hand, is not required to know the signature of the payee of his check. He may, therefore, receive back the statements of his account, accompanied by cancelled checks with forged endorsements of the respective payees and hold these without examination, and the bank will still be liable to pay him all moneys which it has not disbursed in accordance with his order.
>
> "This general rule has been questioned, however, where a trusted employee of a large concern supplies the data upon which the checks are drawn to one of the officers charged with signing the checks, and thereafter, forges the checks which he has theretofore improperly submitted to such an officer. **Under such circumstances, some courts will hold that the depositor had no duty at any time with regard to either its employee or the forged endorsements on the checks. Other courts hold there was a duty owed to the public to supervise the employee and there was a further duty to see that the checks for amounts which the concern did not owe should not be consistently placed in the hands of the public nor offered to the drawee bank. (Citing Young v. Gretna Trust & Savings Bank, 184 La. 872,**

168 So. 85 and Defiance Lumber Company v. Bank of California, N. A., 180 Wash. 533, 41 P. 2d 135). The better view would seem to be that if such conduct were long pursued, a denial of recovery from the drawee bank could be justified, either on principles of negligence or estoppel.

"In this case the court finds that the Interior did not discover within a reasonable time that checks for amounts which it did not owe on payrolls were consistently signed by its responsible officers and, thereafter, forged by its dishonest employee, Crowe, and that thereby defendant and the prior endorsers were misled. The bank was not guilty of negligence and was not involved in the misconduct of Crowe. It is liable, if at all, solely on the contract implied from the deposit by Interior. Since there is no decision of the state courts upon this point cited, however, no attempt will be made to determine the instant case on this ground."

"Irrespective of whether the bank was liable to Interior, its liability to the insurers presents an entirely different problem." (Emphasis ours.)

(The court then discusses the question as to whether the bank is liable to the surety, and held it was not.)

On page 36 of the brief of appellee it is argued:

"The case of *Central Trust Co.* v. *Eureka-Security Fire & Marine Insurance Co.*, 50 Ohio App. 308 (1935), 198 N. E. 62, cited at page 38 of appellants' brief, is shown by the appellants' own statement of the case to be so distinguishable on the facts that it is hardly considered necessary to comment upon it."

In reply to this argument of counsel for appellee it suffices to say that in the case cited the court applied the equitable principle here contended for, notwithstanding the fact that there had been a forgery of the signature of the payee named in the draft.

On page 37 of the brief of appellee it is argued:

"The case of *United States* v. *First National Bank of Prague, Oklahoma,* 124 F. (2d) 484 (C. C. A. 10,

1941) cited at page 40 of appellants' brief, is certainly no authority on behalf of appellants''.

In reply to the argument of counsel for appellee, it suffices to say that in the case cited it appears that the check in suit was endorsed by the defendant, First National Bank of Prague, Oklahoma, and mailed to its correspondent, the Tradesmens National Bank at Oklahoma City. The latter bank placed its endorsement upon the check and presented it through banking channels to the Federal Reserve Bank and it was paid by the Treasurer of the United States. The judgment of the court below for the defendant, Tradesmens National Bank of Oklahoma City was affirmed, and the judgment in favor of the defendant, the First National Bank of Prague, Oklahoma, was reversed for the reason that the fault of the latter bank was the first act which made possible the loss. As against the First National Bank of Prague, Oklahoma, the Circuit Court of Appeals applied the equitable doctrine here contended for by appellants.

At page 37 of the brief of appellee the opinion of the District Court in *Royal Indemnity Co.* v. *Federal Reserve Bank of Cleveland,* 38 F. Supp. 621 (D. C. S. D. Ohio, W. Div., 1939), (affirmed, 119 F. (2d) 778, 1941) is criticized.

In reply to this argument of counsel for appellee it suffices to say that the judgment of the District Court was affirmed in 119 F. (2d) 778 (C. C. A., 6th Cir., 1941), in which the opinion of the District Court was adopted by the appellate court, the per curiam order stating:

> ''This cause was heard upon the transcript of the record, briefs and argument of counsel.
>
> ''On consideration whereof, it is ordered and adjudged that the judgment appealed from be and the same is in all things affirmed upon the grounds and for the reasons set forth in the opinion of the District Judge filed April 29, 1939, 38 F. Supp. 621.''

On pages 40-41 of the brief of appellee the decision of District Judge Bailey, in the case of *United States* v. *Com-*

mercial National Bank, At Law No. 77,050, is discussed in a desultory sort of manner. Notwithstanding what has been said by counsel for appellee, we maintain that the decision of Judge Bailey is peculiarly applicable to the facts here presented.

For the convenience of the court we include, as an appendix hereto, the stipulation of facts in the case of *United States of America* v. *The Commercial National Bank of Washington, D. C.,* Law No. 77,050, in the Supreme Court of the District of Columbia, upon which the decision of Judge Bailey was based.

In replying to the argument of counsel for appellee we have limited our discussion to the cases cited and relied upon in support of our argument under Point I of our brief (Brief, pp. 23 to 44) which appellee has sought to distinguish. In order to avoid unduly lengthening this reply brief, we have not undertaken to discuss the argument of counsel for appellee, wherein it is sought to distinguish the cases cited on the brief of appellants (pages 50 to 64) under Point II of our brief relating to the legal defense of negligence.

Since the filing of brief of appellants, there has come to our attention a recent decision which supports our contention, and it is embodied herein:

United States v. *Bank of America National Trust & Savings Association,* 47 F. Supp. 279 (Dist. Ct., N. D. Cal., S. D., Oct. 20, 1942):

Separate actions by United States of America against Bank of America National Trust and Savings Association, and the Anglo California National Bank to recover certain moneys representing the proceeds of checks drawn on the Treasurer of the United States and collected by the defendants. Judgment for defendants.

The two cases were submitted to the Court upon stipulation of facts which, briefly, are as follows.

The United States employed one Harry S. Howlett as an accountant in the Sacramento office of the Department of Agriculture. His duty was to audit, certify and approve for payment claims for indemnity made by owners of cattle condemned and slaughtered under the tuberculosis eradication program. Treasury checks were issued by the Disbursing Officer in San Francisco for the claims so approved. In violation of the prescribed procedure, a number of blank appraisal forms signed by the veterinarians who conducted the cattle testing program were kept on hand in the Sacramento office. Howlett secured some of these forms, completed them with names and addresses of non-existent persons as owners, and filled out and certified for payment the vouchers that authorized the issuance of the checks. Pursuant to such authority the United States, through its Disbursing Officer, drew and mailed treasury checks addressed to D. C. Long, General Delivery, Lodi, California, R. D. Stone and John Sprague, P. O. Box 1676, Sacramento, and James Hansen, Room 342 Clunie Hotel, Sacramento. Howlett lived at 342 Clunie Hotel. He secured the other checks by renting Box 1676 and calling at General Delivery, Lodi. After indorsing the checks with the names of the payees he cashed the one drawn to Long at the Sacramento Branch of the Bank of America, without any further indorsement. The remaining three checks, indorsed by him, he cashed at the Capital National Bank where he had an account. The four checks, totalling $4,687.44, were subsequently cleared through defendants and paid by the plaintiff, as drawee, through the Federal Reserve Bank. These transactions covered a period of slightly over a year.

The court first held (p. 281) (a) under the applicable provisions of the Civil Code of California the checks were payable to bearer, (b) that the "imposter rule" applied, and (c) "Even if neither of the foregoing theories were applicable the Government might well be barred by its long delay in notifying the defendants after discovery of Howlett's fraud".

The court then held that the equitable principle of estoppel (here presented by the seventh defense of appellants), was applicable. In applying this equitable principle the court said (p. 281):

> "Nor is the plaintiff's position improved by the fact that gross negligence of its own agents facilitated the fraud. Security-First Nat. Bank of Los Angels v. United States, supra, 103 F. 2d 188. Appraisal blanks signed by the field veterinarians, as well as blanks signed by the owners were kept on hand. Thus the supporting papers Howlett needed in order to pass his fraudulent vouchers bore signatures that would be recognized as genuine. The tag book in which the numbered tags clipped to the tubercular cattle were to be recorded was not kept up. The tags themselves were kept in a supply room open to everyone. There was no audit or inspection of any kind. While the Court cannot say that Howlett would not have attempted his fraud under other circumstances, he clearly found it much easier as a result of this course of conduct. **'When both parties to a transaction are innocent, and the loss must fall upon one, it should be upon the one who in law most facilitated the fraud'.** Missouri Pac. R. R. v. M. M. Cohn Co., 164 Ark. 335, 261 S. W. 895, 896.
>
> "Upon full consideration of all the circumstances, therefore, the Court finds for the defendants and judgment will be entered accordingly, upon findings of fact and conclusions of law. The parties will pay their own costs." (Emphasis ours.)

CONCLUSION.

In conclusion, it is respectfully submitted, as pointed out in our original brief, (pp. 23-49) that the court below erred in ruling and holding that the equitable principle and doctrine that where one of two innocent persons must suffer by reason of the wrongdoing of a third person the one whose fault made possible the loss should bear such loss, is not applicable to the facts stated in the opening statements of

counsel for defendants, and that no reason has been advanced on the brief of appellee why the judgment of the court below should not be reversed because of this obvious error.

Respectfully submitted,

ARTHUR PETER,
GEORGE P. HOOVER,
Attorneys for appellant,
The Washington Loan and Trust Company.
(No. 8247)

FRANK J. HOGAN,
NELSON T. HARTSON,
Attorneys for appellant,
The Riggs National Bank of Washington, D. C.
(No. 8248)

GEORGE P. HOOVER,
WALTER B. GUY,
Attorneys for Appellant,
The Columbia National Bank of Washington.
(No. 8249)

APPENDIX

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Holding a Circuit Court

Law No. 77,050

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C., a Corporation, (14th and G Streets, N. W., Washington, D. C.) *Defendant.*

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between counsel for the plaintiff and counsel for the defendant, whose names are signed hereto, that the following shall be taken as and for a stipulation of the facts in the above entitled cause:

During all of the times mentioned in the declaration, including the time from July 1, 1926 to and after the 31st day of May, 1927, one Joseph W. Frenzel was employed as a clerk in the Office of the Auditor for the Government of the Distict of Columbia; and while so employed, he had instructed one C. Ray Severance, also known by the names of C. W. Cockerill, C. C. Williamson, A. C. Smith and C. C. Williams, how to obtain blank voucher forms from the Office of the Tax Collector for the District of Columbia, which blank voucher forms were the forms used and to be used for applications to the Auditor for the District of Columbia for refunds of taxes; that Frenzel and Severance evolved a scheme to claim refunds for pretended duplicate payments of taxes, and they together prepared certain false vouchers for such refunds. Frenzel, during the time aforesaid,

forged on each of the vouchers involved herein (except the voucher whereby the check made payable to Chas. F. Fadeley for $451.78 was secured), the name of W. D. Clark, Jr., Deputy Collector of Taxes for the District of Columbia, whose signature was necessary upon the said vouchers before the claim therein would be allowed and paid. The name of W. D. Clark, Jr. upon the voucher whereby the Fadeley check above described was secured, was signed thereon by Clark on the assumption that the voucher was regular. All of the vouchers involved herein, which vouchers are attached hereto and made a part of this stipulation, marked Exhibits A, B, C, D, E and F, were in duplicate, and were placed by Frenzel in the regular channels of the Auditor's Office, and in due course, the duplicate-original of each voucher reached the Office of the Disbursing Clerk for the District of Columbia, which office, finding said vouchers in regular form, issued checks corresponding with the amounts claimed in said refund vouchers, and mailed them to the addresses set out on the said duplicate-original vouchers. According to the practice of the Office of the Auditor for the District of Columbia, these tax refund vouchers were drawn in duplicate, the first original being retained in the Office of the Auditor and the duplicate-original being sent to the Disbursing Office of the District of Columbia for retention there, and payments were made by check from such duplicate-originals. With respect to each of the pairs of vouchers involved herein, the address given upon the vouchers when first presented by Frenzel was a false address, and Frenzel, having access to the vouchers in the Auditor's Office, obtained in each instance the duplicate-original vouchers and changed the addresses thereon from the original false address to another address, which second address was an address used by Frenzel and Severance for the purpose of obtaining the refund checks sent out by the Disbursing Officer for the District of Columbia in conformity with the terms of the vouchers; and in each instance the check corresponding with the voucher, which checks were the

checks referred to in the declaration, was mailed to such substituted address, and at that address obtained in the manner set forth below. In order to further the plan, Severance, by name of C. W. Cockerill, opened a checking account at The Commercial National Bank of Washington, D. C., the defendant herein, and each of the checks involved in this suit was deposited in such account by Severance. All of the claims for refunds above referred to were false claims. Taking the checks upon which this suit is based in the order in which they are set forth in the declaration:

Check No. 95,398 was based upon a voucher claiming a refund in favor of C. W. Cockerill, and was mailed to the address in the attached voucher marked Exhibit A-1, and was received by Severance on or about July 6, 1926, and indorsed by him by name of C. W. Cockerill, and deposited in the Cockerill account at The Commercial National Bank;

Check No. 111,581 was based upon a voucher claiming a refund in favor of C. W. Cockerill, and was mailed to the address in the attached voucher marked Exhibit B-1, and was received by Severance on or about August 14, 1926, and indorsed by him by name of C. W. Cockerill, and deposited in the Cockerill account in the defendant bank;

Check No. 147,905 was based upon a voucher claiming a refund in favor of Chas. F. Fadeley, and was mailed to the address in the attached voucher marked Exhibit C-1, and was received by Severance on or about November 3, 1926, and indorsed by him in the name of Chas. F. Fadeley, and again indorsed by him in the name of C. W. Cockerill, and deposited in the Cockerill account in the defendant bank;

Check No. 186,076 was based upon a voucher claiming a refund in favor of C. C. Williamson, and was mailed to the address in the attached voucher marked Exhibit D-1, and was received by Severance on or about January 14, 1927, and indorsed by him by name of C. C. Williamson, and again indorsed by him by name of C. W. Cockerill, and deposited in the Cockerill account in the defendant bank;

Check No. 226,966 was based upon a voucher claiming a refund in favor of C. C. Williams, and was mailed to the address in the attached voucher marked Exhibit E-1, and was received by Severance on or about April 5, 1927, and indorsed by him by name of C. C. Williams, and again indorsed by him by name of C. W. Cockerill, and deposited in the Cockerill account in the defendant bank;

Check No. 254,952 was based upon a voucher claiming a refund in favor of A. C. Smith, and was mailed to the address in the attached voucher marked Exhibit F-1, and was received by Severance on or about May 26, 1927, and indorsed by him by name of A. C. Smith, and again indorsed by him by name of C. W. Cockerill, and deposited in the Cockerill account in the defendant bank;

Photostat copy of each of the checks referred to in the declaration is attached hereto and made a part of this stipulation, marked Exhibits 1, 2, 3, 4, 5 and 6, respectively, and each of the checks bore the indorsement of The Commercial National Bank of Washington, as set forth in the declaration.

None of the names appearing as payees on the above checks were names of tax-payers in the District of Columbia, except the name of Chas. F. Fadeley, and were not names of persons entitled to refunds of taxes. Chas. F. Fadeley was a tax-payer in the District of Columbia during the time alleged in the declaration, but was not entitled to any tax refund during that period.

Each of the checks was presented by the Commercial National Bank of Washington to the Treasurer of the United States, who made payment upon them to the said bank. Severance, using the name Cockerill, thereafter withdrew all of the funds deposited in the Cockerill account from the defendant Bank, and the account was closed. After this occurred, the Treasurer of the United States, on behalf of the United States, made demand upon the defendant bank for repayment of the amount of the checks above referred

to, which demand was refused. The defendant Bank had no knowledge of the fraud or deceit perpetrated by Frenzel and Severance until the time of said demand; and there was no knowledge of such fraud and deceit on the part of the United States, until after Severance had withdrawn all of the funds in the Cockerill account from the defendant Bank.

(S) LEO A. ROVER,
U. S. Attorney in and for the District of Columbia.

(S) WM. A. GALLAGHER,
Asst. U. S. Atty.

(S) I. HAROLD SOTHORON,
Attorney for the Commercial National Bank of Washington.